TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 485.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

JEANETTE STEWART, AS ADMINISTRATRIX OF THE ESTATE OF WILLIAM H. STEWART, DECEASED.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED JUNE 1, 1915.

(24,757)

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a COMMONWEALTH OF KENTUCKY:

The Court of Appeals.

Pleas Before the Honorable the Court of Appeals of Kentucky, at the Capitol, in the City of Frankfort, on the 26th Day of March, 1915.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
WILLIAM H. STEWART'S ADMINISTRATRIX, Appellee.

Appeal from the Warren Circuit Court.

Be it remembered that heretofore, to-wit, on the 8th. day of December, 1914, the appellant by its counsel filed in the office of the Clerk of the Court of Appeals a transcript of record in the above styled case, the part of which as ordered to be copied by appellant's præcipe filed herein and by the Præcipe and Supplemental Præcipe of appellee is in words and figures following, to-wit:

1 Be it remembered that the following, with the bill of evidence attached, is a true, correct and complete transcript of the entire record of the case late pending in the Warren Circuit Court wherein William H. Stewart's administratrix, Jeanette Stewart, was plaintiff, and the Louisville & Nashville Railroad Company was defendant.

Pleas Before the Hon. McKenzie Moss, Judge Presiding.

The following is a copy of the petition filed in open Court on the 30th. day of July, 1910:

Warren Circuit Court, October Term, 1910.

WILLIAM H. STEWART'S ADMINISTRATRIX, JEANETTE STEWART,
Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Petition.

This plaintiff, Jeanette Stewart, says that she is the duly qualified and acting administratrix of William H. Stewart, deceased, who was her husband. She says she was appointed same by order of the Warren County Court, October 10, 1908, and took the oath and executed the bond required by law, and as such she prosecutes this suit. She says that the Louisville & Nashville Railroad Company

is a corporation and common carrier, created by an act of the Legislature of Kentucky, with power to sue and be sued under the corporate name used in the caption. She says further that the
2 defendant is now and has been for many years last past operating extensive lines of railroad and engaged in commerce between the States of Kentucky and Tennessee, and other states, carrying freight and passengers over its said lines through the State of Kentucky into Tennessee and other states, and doing a general inter-state business and commerce as a common carrier. She says further that defendant has now, and has maintained for many years past an office and agent at Bowling Green, Kentucky, in which City her said husband resided at the time of his death, and this plaintiff now resides in said City. She says further that on the 5th. day of September, 1908, her said husband was employed by defendant as an engineman upon one of its freight trains, and employed in the inter-state traffic and commerce aforesaid, running from Bowling Green, Kentucky, to Paris in the State of Tennessee and while so employed in discharge of his duty as engineman, in said State, at Cumberland City, and without fault or negligence upon his part he was injured by the gross negligence of defendant and its agents, and employes, and as a direct and proximate result of said injury, her said intestate died in the City of Bowling Green twenty seven days after such injury and his services were thereby lost to his estate and this plaintiff to their damage and injury in the sum of $15,000.00.

She says that at the time of his death decedent had for wife this plaintiff, and three minor children, James Theodore, a son, now six years old, William Albert, another son, now four years old, and Christine Rebecca, a daughter, one year old, all of whom were dependent upon said decedent for support, and that her said husband was at the time of his injury receiving for his services and
3 earning $160.00 per month, and was in good health, thirty four years of age, and his expectancy of life was 31.68 years.

She says further that at the time of the death of her said decedent, under the statute law of the State of Tennessee, then in force, a right of action for his injuries survived for the benefit of this plaintiff, his widow, and his said infants, and says further that a cause of action also survives and was created for their use and benefit under an act of Congress, approved April 22, 1908, entitled: "An act relating to the liability of common carriers by railroad to their employees, in certain cases." The first and sixth sections of said act are respectively as follows:

"Sec. 1. Be it enacted by the Senate and House of representatives of the United States of America in Congress assembled, that every common carrier by railroad, while engaged in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the States or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death

of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees, of such carrier,
4 or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track roadbed, works, beats, wharves or other equipment.

Sec. 6. That no action shall be maintained under this act unless commenced within two years from the day *of* the cause of action accrued."

She says that she pleads and relies upon the provisions of said act and says that as a direct result of the injury aforesaid, she, as plaintiff and widow, and her infant children and her husband's estate have been damaged in the sum of $15,000.00, which she should recover of defendant.

Wherefore, the premises considered, plaintiff prays judgment against defendant for fifteen thousand dollars, her costs and for all proper relief.

B. F. PROCTER,
Attorney for Plaintiff.

The following is a copy of an order entered in open Court on the 5 day of September, 1910:

Warren Circuit Court.

W. H. STEWART'S ADM'R'X, &c., Plaintiff,
v.
L. & N. R. R. Co., Defendant.

Order.

This day came the plaintiff and filed in office, pursuant to the Code of Practice in such cases provided, an amended petition.

The following is a copy of the amended petition filed in office on rule day, 5 day of September, 1910:

Warren Circuit Court.

W. H. STEWART'S ADM'R'X, &c., Plaintiff,
vs.
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

5 *Amended Petition.*

This plaintiff, for amendment herein, says that there is but one cause of action in her petition, and she claims and so intended the

benefit of the Federal Statute known as the employee's Liability Act.

Wherefore she prays as heretofore.

B. F. PROCTER,
Attorney for W. H. Stewart's Adm'r'x, &c.

The following is a copy of an order entered in office on rule day, the 5 day of September, 1910:

Warren Circuit Court.

W. H. STEVENS' ADM'R'X, &c.,
vs.
L. & N. R. R. Co.

Order.

Came the defendant and moved the Court to require plaintiff to elect whether he will proceed in this case under the Tennessee law or statutes or under the Federal Statute referred to or set out in his petition and to strike from the petition all allegations with reference to any law other than the one under which he elects to proceed.

The following is a copy of an order entered in open court on the 17 day of October, 1910:

Warren Circuit Court.

W. H. STEVENS' ADM'R'X, &c.,
v.
L. & N. R. R. Co.

Order.

6 Came the defendant and moved the Court to strike out of the petition herein certain parts as indicated in the motion filed.

The following is a copy of the motion filed in open Court on the 17th day of October, 1910:

Warren Circuit Court.

STEWART ADM'R'X, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Motion.

The plaintiff, having filed an amended petition herein electing to proceed under the Act of Congress approved April 22nd, 1908,

entitled an Act relating to the liability of common carriers by railroad to their employes in certain cases, and commonly known as the Employers' Liability Act. Now comes this defendant and moves to strike out of plaintiff's petition the following words, to-wit:

"She says further that at the time of the death of her decedent under the statute law of the State of Tennessee, then in force, a right of action for his injuries survives for the benefit of this plaintiff, his widow, and his said infants."

And upon this motion this defendant prays the judgment of the Court.

SIMS & RODES,
Att'ys for Def'ts.

7 The following is a copy of an order entered in open Court on the 12th day of November, 1910.

Warren Circuit Court, October Term, 1910.

W. H. STEWART'S ADM'R'X, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Order.

This cause having been submitted upon defendant's motion to strike out certain parts of plaintiff's petition and by consent of plaintiff in open Court, it is now ordered that said motion be and is hereby sustained and that the following words in plaintiff's petition, to wit:

"She says further that at the time of the death of her decedent, under the statute law of the State of Tennessee, then in force, a right of action for his injury survived for the benefit of this plaintiff, his widow, and his said infants."

be and is hereby stricken out of said petition.

Therefore came defendant and filed demurrer and this cause is submitted on said demurrer.

The following is a copy of the demurrer filed in open Court on the 12th day of November, 1910:

Warren Circuit Court.

WILLIAM H. STEWART'S ADMINISTRATRIX, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

8 *Demurrer to Petition.*

The defendant demurs to plaintiff's petition herein, because the act of Congress upon the provisions of which this alleged cause of action is based, is unconstitutional and void:

1. Because Congress has no power under Article 1, Section 8 of the Constitution of the United States to enact said statute;

2. Because the statute assumes to govern the relation of master and servant as between an interstate carrier and interstate employe;

3. Because the statute is not in any sense a regulation of commerce among the several states;

4. Because the statute provides a remedy only to an injured employe and, therefore, is in no sense an Act to regulate Commerce;

5. Because by the terms of the statute defendant would be made liable by reason of the negligence of an intrastate employe;

6. Because Congress is prohibited, by the Fifth Article or Amendments to the Constitution of the United States, from depriving any person, of life, liberty or property without due process of law;

7. Because the statute violates the true intent of said Fifth Article of Amendments to the Constitution;

8. Because the statute is partial in its operation and not founded upon a reasonable or just classification;

9. Because the statute is not limited in its operation to such classes of employees, as, if Congress has the power to legislate at all upon the subject, might reasonably and rightfully be embraced within the terms of such a statute;

10. Because Congress has no power to provide a remedy to an injured employe of an interstate carrier as provided in section 3 of said statute;

9 11. Because Congress has no right, as it attempted to do in section 5 of the statute, to prohibit the making of a contract of employment which releases in advance actions for negligence, as such a prohibition would deprive both employer and employe of the valuable and inalienable right of liberty of contract contrary to the Fifth Article of Amendments to the Constitution of the United States (Adair v. United States, 208 U. S. 161).

Defendant demurs further upon the ground that even if the statute under which this action is brought is constitutional, it is not available to plaintiff in this case for the reason that Congress did not intend by said Act of April 22, 1908, to authorize the institution of an action under it in the Courts of the States, but only in the Federal Courts, and (2) Congress has not the power to make it incumbent on the Courts of the States to assume jurisdiction of such an action.

Defendant further demurs to plaintiff's petition herein because the same does not state facts sufficient to constitute a cause of action against this defendant.

SIMS & RODES,
Att'ys for Def't.

The following is a copy of an order entered in open Court on the 3 day of January, 1911:

Warren Circuit Court.

W. H. STEWART'S ADM'R'X, &c.,
vs.
L. & N. R. R. Co.

Order.

This cause having been submitted on demurrer of defendant to the petition and the Court being advised, adjudges and orders that said demurrer be and the same is overruled, the Court being of the opinion and so adjudging that the Act of Congress, approved April 22, 1908, entitled "An Act relating to the liability of Common Carriers by Railroad to their employees in certain cases" is constitutional and valid and this Court has jurisdiction of this action. To all of the above rulings of this Court defendant excepts.

The following is a copy of an order entered in open Court on the 20th day of January, 1911:

Warren Circuit Court.

W. H. STEWART'S ADM'R'X
vs.
L. & N. R. R. Co.

Order.

Comes defendant and moves the Court to require plaintiff to make the petition more specific, and this cause being submitted on said motion and the Court being advised, it is adjudged that the same be and it is hereby sustained, to which ruling of the Court plaintiff objects and excepts.

The following is a copy of the motion entered in open Court on the 20 day of January, 1911:

Warren Circuit Court.

WM. H. STEWART'S ADMINISTRATRIX, Plaintiff,
v.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Motion to Make Petition More Specific.

Comes defendant, and without waiving its demurrer to the petition, moves the Court to require plaintiff to make her petition more definite and certain, so as to allege by what act or acts of gross

negligence of defendant, its agents and employes, plaintiff claims her decedent, Wm. H. Stewart was injured at the time complained of in the petition.

SIMS & RODES,
Attorneys for Defendant.

11 The following is a copy of an order entered in open Court on the 11 day of November, 1911:

Warren Circuit Court.

W. H. STEWART'S ADMINISTRATRIX
v.
L. & N. R. R. Co.

Order.

This cause having been submitted on motion of defendant to require plaintiff to make his petition more specific and definite as to the act or acts constituting the negligence alleged in the petition and the Court being advised, adjudges that the said motion be and the same is sustained and plaintiff is required to set out the specific acts of negligence referred to in her petition, to all of which ruling the plaintiff objects and excepts.

The following is a copy of an order entered in open Court on the 26th day of January, 1912:

Warren Circuit Court.

WILLIAM H. STEWART'S ADMINISTRATRIX, JEANETTE STEWART,
Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Order.

This day came the plaintiff and filed an amended petition to conform to the order and to make her petition more specific.

The following is a copy of the amended petition filed in open Court on the 26 day of January, 1912:

12 Warren Circuit Court.

WILLIAM H. STEWART'S ADMINISTRATRIX, JEANETTE STEWART, Plaintiff,
vs.
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Amended Petition.

The plaintiff comes and amends her petition herein to conform to the order and make it more specific says that at the time of his injury her intestate and husband was in the cab of his engine, and defendant and its agents and servants did with negligence so operate and manage the engine and train upon which he was serving as to throw, or cause him to fall against the side of the cab or engine, and injure him that he died as the result of said negligence, and this is the injury and negligence for which she sues.

Wherefore she prays as heretofore.

B. F. PROCTER,
Attorney for Plaintiff.

The following is a copy of an order entered in open Court on the 1 day of April, 1912:

Warren Circuit Court, April Term, 1912.

W. H. STEVENS' ADM'R'X, &c.,
v.
THE L. & N. R. R. CO.

Order.

This day came the plaintiff in open Court and moved to file of record an amendment filed on March 27, 1912, in office, upon accepted notice, which motion is filed as part of this record,
13 and defendant objected to the filing, it is now ordered that the motion be submitted.

The notice mentioned above is not found in the papers.

The following is a copy of the amended petition filed in open Court on the 1 day of April, 1912:

Warren Circuit Court, April Term, 1912.

W. H. STEWART'S ADM'R'X, &c., Plaintiff,
vs.
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Amended Petition No. 3.

This plaintiff comes and amends her petition hereinbefore — answer, and to conform to the proof and says that her said husband was

sober, industrious, moral and a skilled engineer, and devoted to his said infant children, and his services in their training, instruction, care and attention were of the highest value and all of which was lost to them as well as his wages named in the original petition by the same negligence alleged heretofore whereby the said infants and this plaintiff were damaged in the sum of thirty-five thousand dollars, which sum they should recover of defendant.

Wherefore she prays for thirty-five thousand dollars, her costs and all proper relief.

B. F. PROCTER,
Attorney for Plaintiff.

The following is a copy of an order entered in open Court on the 3rd day of April, 1912:

Warren Circuit Court, April Term, 1912.

14 W. H. STEWART'S ADM'R'X, Plaintiff,
v.
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Order.

This cause coming on for trial on motion of plaintiff to file an amended petition, of record, heretofore filed in the Clerk's office, and the Court being advised, it is adjudged that said motion be sustained, and said amendment is hereby filed. To all of which defendant excepts.

The following is a copy of an order entered in open Court on the 5th day of April, 1912:

Warren Circuit Court.

W. H. STEWART'S ADM'R'X, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Order.

This cause having been submitted on defendant's motion to require the plaintiff to make her petition more specific, filed on January 20th, 1911, *and* the Court being advised, sustained said motion and ordered that plaintiff make her petition more specific by setting out by what acts of negligence the alleged injuries occurred as set out in the petition, to all of which plaintiff excepted. Thereupon the plaintiff, having on January 26th, 1912, filed her amended petition in alleged compliance with said order, the defendant objected and insisted upon its former motion and the Court being advised overruled its objection and its said motion to make more specific as

applied to said petition and amended petition, to all of which the defendant excepted at the time. Thereupon came the defendant and filed its motion to strike out from the plaintiff's petition
15 certain words as set out therein, to which the plaintiff objected, and this cause is now submitted on said motion to strike out.

The following is a copy of the motion entered in open Court on the 5 day of April, 1912:

Warren Circuit Court.

W. H. STEWART'S ADM'R'X, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Motion to Strike from Petition.

Comes the defendant, and not waiving its demurrer, its motion to make more certain, and its motion to elect, *and* moves the Court to strike from the petition the following words, to-wit: "And his services were thereby lost to his estate"; also the words: "She says that at the time of his death decedent had for wife this plaintiff, and three minor children, James Theodore, a son now six years old, William Albert, another son, now four years old, and Christine Rebecca, a daughter, one year old, all of whom were dependent upon said decedent for support"; also the following words: "And her husband's estate", where they occur in the following sentence: "And says that as a direct result of the injury aforesaid, she as plaintiff and widow, and her infant children and her husband's estate have been damaged; etc.

SIMS & RODES,
Attorneys for Defendant.

16 The following is a copy of an order entered in open Court on the 5 day of April, 1912:

Warren Circuit Court, April Term 1912.

W. H. STEWART'S ADM'R'X, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Order.

This cause being submitted for judgment upon Defendant's motion to strike out parts of the petition and the Court being advised it is adjudged that the motion be overruled, to which Defendant excepts.

The following is a copy of an order entered in open Court on the 9th. day of April, 1912:

Warren Circuit Court.

W. H. STEWART'S ADM'R'X, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Order.

This day came the defendant and filed its motion to strike out — of plaintiff's petition number 3, and this cause being submitted upon said motion, *and* the Court being advised adjudges and orders that the same be and the same is hereby overruled, to which the defendants excepts. Thereupon came the defendant and filed its general demurrer herein to plaintiff's petition as amended, and this cause was submitted upon said general demurrer and the Court being advised orders and adjudges that said demurrer be and the same is hereby overruled, to which defendant excepts. Thereupon came defendant and tendered its answer herein, to the filing of which
17 Plaintiff objected and excepted; and Plaintiff moved the Court to adjudge the allegations of the petition to be taken as confessed, and the court overruled said motion to which Plaintiff excepts; and the Court further overruled Plaintiff's objection to the filing of answer herein, and orders same to be and it is hereby filed, to which Plaintiff excepts.

The following is a copy of demurrer filed in open Court on the 9th. day of April, 1912:

Warren Circuit Court.

WM. H. STEWART'S ADM'R'X, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

General Demurrer.

Comes the defendant, Louisville & Nashville Railroad Company, and without waiving its special demurrer hereinbefore filed and its motion to make more specific and definite and to strike out and its objections to plaintiff's amended pleadings filed, now demurs generally to the plaintiff's petition as amended because it says the said petition as amended does not state facts sufficient in law to constitute any cause of action against defendant; and upon this it prays the judgment of the court.

SIMS & RODES, *Att'ys.*

The following is a copy of a motion filed in open Court on the 9th. day of April, 1912:

Warren Circuit Court.

WM. H. STEWART'S ADM'R'X, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Motion.

Comes the defendant and without waiving any of its former motions herein or objections, *and* moves the court to strike from plaintiff's amended petition number 3 the following words, to-wit:
18 "That her said husband was sober, industrious, moral and a skilled engineer, and devoted to his said children and his services in their training, instruction, care and attention were of the highest value and all of which was lost to them, as well as his wages named in the original petition by the same negligence alleged heretofore".

And upon this motion it prays the judgment of the court.

SIMS & RODES, *Att'ys.*

The following is a copy of Answer filed in open court on the 9th. day of April, 1912:

Warren Circuit Court.

W. H. STEWART'S ADM'R'X, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Answer.

Comes the defendant and without waiving its demurrer and its motions to require plaintiff to elect, to make her petition more definite and certain, and to strike from her petition and without waiving its objections to plaintiff's filing her two last amended petitions herein, and for answer to so much of plaintiff's petition as it is advised it is necessary to answer, it says: That it has no knowledge or information sufficient to form a belief and therefore denies that Jeanette Stewart, named in the petition herein, was appointed as administratrix of the estate of William H. Stewart by order of the Warren County Court on October 1st. 1906, or at any time, or that she took the oath or executed the bond required by law or that she is the duly qualified or acting administratrix of William H. Stewart,
19 deceased.

Defendant denies that said decedent was, without fault or negligence on his part, injured by the gross or any negligence of defendant or its agents or employees or at the time or place mentioned in the petition or at any other time or place; and denies that defendant or its agents or employees were negligent at all. Defendant denies that as the direct or prominate result of the injury alleged in the petition said William H Stewart died 27 days after

said alleged injury or at any other time. Defendant denies that plaintiff has been damaged or that she should recover $15,000 or any other sum as a result of decedent's alleged injury or death. Defendant denies that decedent was earning $160 per month or that he was in good health at the time of his alleged injury. Defendant denies that as a direct result of the alleged injury, plaintiff or her infant children or her husband's estate have any of them been damaged in the sum of $15,000 or in any sum, or that plaintiff should recover any sum of defendant. For further answer defendant says that the Act of Congress approved April 22, 1908, attempted to be relied on by plaintiff in her petition is not applicable to the facts of the case, and that the plaintiff is not entitled to recover in this action by reason of said statute or otherwise.

Further answering the 2nd. amended petition defendant denies that at the time of the alleged injury of plaintiff's intestate, her husband was in the cab of his engine or that defendant or its agents or servants did, with negligence, or at all so operate or manage the engine or train upon which said William H. Stewart was serving as to throw or cause him to fall against the side of the cab or engine or to injure him, and denies that he was thrown or caused to fall against the side of the cab or engine or elsewhere or injured or that defendant or its agents or servants were negligent in any wise; denies that said Stewart died as the result of said alleged negligence or at all or that this is the alleged injury or negligence for which the plaintiff sues.

Further answering plaintiff's amended petition number 3 the defendant says it has no knowledge or information sufficient to form a belief and therefore, denies that her said husband was sober or industrious or moral or a skilled engineer or devoted to his infant children; and denies that his services in their training or instruction or care or attention were of the highest value or any value and it has no knowledge or information sufficient to form a belief and therefore denies that he gave said children training or instruction or care or attention or that all of same was lost to them or that his wages were lost to them by the same or any negligence as set out in the petition or at all, and denies that thereby or at all the said infants or plaintiff were damaged in the sum of $35,000 or in any sum or that they should recover any sum of defendant.

Paragraph No. 2. Further answering defendant states that the plaintiff's intestate at the time and place referred to in the petition, and at the time and place of his alleged injury, if he was injured, which it denies, was himself negligent and his own negligence and want of ordinary care for his own safety contributed to produce said alleged injury to such an extent that but for same it would not have occurred; and defendant pleads the contributory negligence of said W. H. Stewart in diminution of the alleged damages herein.

Wherefore defendant prays that the plaintiff's petition be dismissed, for its costs and all proper and general relief.

SIMS & RODES, *Att'ys.*

The following is a copy of an order entered in open Court on the 9th. day of April, 1912.

Warren Circuit Court.

21 WM. H. STEWART'S ADM'R'X
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Order.

Came defendant by attorneys and filed exceptions to the depositions of plaintiff and plaintiff also filed reply herein.

The following is a copy of exception filed in open court on the 9th. day of April, 1912:

Warren Circuit Court.

W. H. STEWART, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Exceptions to Depositions.

Comes the defendant on this day and in advance of the trial of this case and excepts to the depositions of W. C. Minor, O. L. Hill, H. T. Jones and T. A. Sorrels upon the following grounds, to-wit:

It states that said Minor, Jones, Hill and Sorrells are each of them present in court just before the trial of this case and will be present during the trial of this case and sworn to testify as witnesses therein, and that each of them will be produced and offered as witnesses upon the hearing of the case before the jury. Defendant states further that said Jones and said Minor reside in Bowling Green, Kentucky, as does also said Sorrells.

Defendant objects and excepts to each of said depositions and to the reading of same or any part thereof before the jury and upon this it prays the judgment of the court.

SIMS & RODES.

The following is a copy of reply filed in open court on the 9th. day of April, 1912:

22 Warren Circuit Court, April Term, 1912.

W. H. STEWART'S ADMINISTRATRIX, &c., Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Reply.

For reply to so much of Defendant's answer as plaintiff is advised is material Plaintiff denies that the act of Congress named in the pleading is not applicable to the facts of this case and denies that she is not entitled to recover under said statute.

For reply to paragraph 2, Plaintiff denies that her intestate was himself negligent in any way and denies that by his own alleged negligence or want or ordinary care for his own safety he contributed to produce said injury to any extent or at all and denies Defendant's right to plead his alleged contributory negligence in diminution of damages.

Wherefore she prays as heretofore and for all proper relief.

B. F. PROCTER,
Att'y for Plaintiff.

23 The following is a copy of an order entered in open court on the 9th. day of April, 1912:

Warren Circuit Court.

W. H. STEWART'S ADM'R'X
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Order.

Came plaintiff by att'y, and the issue being joined thereupon came the following jury: Brown Glenn, Leslie Kelley, W. C. Cooksey, Samuel Young, P. E. Eadens, C. W. Rogers, Jno. T. Doolan, C. F. Cox, S. M. Lay, Jack Barber, J. H. Kingston and Elzy Garrett, who were sworn to well and truly try the issue and a true verdict render and on motion of defendant, ordered that the Official stenographer make full and complete shorthand notes of all the testimony had and heard upon the trial of this case and after hearing part of the testimony, it appeared that there will not be time to complete the trial on today the jury was permitted to separate until tomorrow morning at 9 o'clock under the usual instructions and admonitions of the court not to speak to any one or permit any one to speak to them concerning this case.

The following is a copy of an order entered in open court on the 10th. day of April, 1912:

Warren Circuit Court.

W. H. STEWART'S —
vs.
LOUISVILLE & NASHVILLE —.

24 *Order.*

Again came parties by Attorneys and the jury sworn in on yesterday and at the conclusion of Plaintiff's testimony, defendant moved the Court for a peremptory instruction and the Court being advised, said motion is overruled to which defendant excepts. Thereupon came defendant and tendered an amended answer herein and entered its motion to file same, to which plaintiff excepts and the Court being advised on said motion the same overruled, to which ruling defendant excepts. There not being time to complete the trial on today the jury was permitted to separate until tomorrow morning at 9 o'clock under the usual instructions and admonitions of the Court not to speak to any one or permit any one to speak to them concerning the case.

The following is a copy of an order entered in open court on the 11th. day of April, 1912:

Warren Circuit Court.

W. H. STEWART'S ADM'R'X
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Order.

Again came parties by Attorneys and the jury *being* sworn herein on a former day and after hearing the remainder of the testimony, instructions of the court and arguments of counsel retired to their room to consider of their verdict and afterward returned into open court the following verdict, to-wit:

"We the jury find for plaintiff to the amount of $20,000.

S. M. YOUNG, *Foreman.*

It is therefore adjudged by the court that the plaintiff, Jeanette Stewart, Administratrix of the estate of Wm. H. Stewart, recover of the defendant, Louisville & Nashville Railroad Company, a corporation, the sum of $20,000 and her costs herein expended.

The following is a copy of an order entered in open court on the 13th. day of April, 1912:

Warren Circuit Court.

W. H. STEWART'S ADM'R'X
VS.
LOUISVILLE & NASHVILLE RAILROAD CO.

Order.

Came defendant by attorneys and filed motion and grounds for a new trial herein.

The following is a copy of the motion and grounds for a new trial filed in open court on the 13th. day of April, 1912:

Warren Circuit Court.

W. H. STEWART'S ADM'R'X
VS.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Motion and Grounds for New Trial.

Comes the defendant, Louisville & Nashville Railroad Company, and moves the court to set aside the verdict of the jury herein and to grant to the defendant a new trial upon the following grounds, to-wit:

26 (1) Because the damages given by the jury in their verdict are excessive and appear to have been given under the influence of passion or prejudice:

(2) Because the verdict is not sustained by sufficient evidence and is contrary to law.

(3) Because the court erred in refusing on motion of defendant and at the conclusion of plaintiff's testimony, to peremptorily instruct the jury to find a verdict for the defendant.

(4) Because the court erred in giving to the jury instructions Nos. 1, 2, 3, 5, 6 and each of them.

(5) Because the court erred in refusing to give to the jury instruction marked "A," offered in behalf of and by defendant.

(6) Because the court erred in admitting over the objection of defendant incompetent evidence to the jury and because the court erred in the exclusion of competent testimony offered by defendant, all to the prejudice of the defendant.

(7) Because there was no proof in the case of the plaintiff's appointment or qualification as administratrix of the estate of Wm. H. Stewart, deceased, and no proof that she was acting as such.

(8) Because the court erred in the admission of testimony, over the objection of defendant, upon the trial, that the plaintiff had an afflicted child, the child of the decedent, W. H. Stewart, and because of the misconduct of counsel of the plaintiff in his argument in refer-

ring to such testimony and speaking of such child as an "imbecile," whereas in said testimony referred to, he had been called an "afflicted child," all of which was to the prejudice of the defendant.

27 (9) Because the court erred in overruling the defendant's motion at the conclusion of plaintiff's testimony to file an amended answer, which, by order of court, was made a part of the record, but not filed.

(10) Because of misconduct of counsel for plaintiff in his argument to the jury in referring to and reading to the jury from plaintiff's book of rules rule No. 104 which had never been introduced in evidence or read to the jury upon the trial of the case.

(11) Because the court erred in giving to the jury instructions No-. 1, 2, 3, and 5 all and each of which are not in conformity to but in violation of the terms and provisions of the Act of Congress of April 22, 1908, commonly known as the Eemployers' Liability Act; and further erred in permitting testimony to be heard by the jury over defendant's objection as to the condition, situation and ages of the intestate's children, for the purpose of magnifying the damages sued for, in violation of the terms and provisions of said Act of Congress of April 22, 1908; because the court erred further in overruling the defendant's motion to require the plaintiff to make her petition more specific and definite and to set out what act or acts of negligence were complained of and the bases of the damages sued for, as required by the usages and practices and rules prevailing in the Federal Courts of the United States, and in conformity to the terms and provisions of said Act of Congress of April 22, 1908; and because the court erred in overruling the defendant's motion at the conclusion of plaintiff's testimony and of all testimony, to peremptorily instruct the jury to find a verdict for the defendant,

28 because under such evidence no right of action existed against the defendant according to the terms and provisions of the said Act of April 22, 1908.

Defendant states further that by reason of such errors above complained of the defendant has been deprived of the benefit of those provisions of the Constitution of the United States set out in Articles 5 and 14 of the Amendments to said Constitution; it has thereby been deprived of property without due process of law in violation of article 5 of said amendment, and it has been further deprived of property without due process of law and denied the equal protection of the laws in violation of Article 14, Section 1 of said Amendment to the Constitution of the United States.

(12) Because the alleged verdict returned by the jury is not a proper or valid verdict because the same is indefinite and uncertain in meaning and not in any form required by law or the instructions of the court.

Wherefore, defendant prays for a new trial and all proper relief.

SIMS & RODES.

The following is a copy of an order entered in open court on the 22nd. day of April, 1902:

Warren Circuit Court.

W. H. STEWART'S ADM'R'X, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Order.

This day came plaintiff and tendered in open court and asked to file the affidavit of plaintiff and exhibits named therein as evidence on motion for a new trial to which defendant objected.

29 The following is a copy of an order entered in open court on the 27th. day of April, 1912:

Warren Circuit Court, April Term.

W. H. STEWART'S ADM'R'X, Pl'ff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Order.

This day came plaintiff, and filed an affidavit of Mrs. W. H. Stewart on motion for a new trial, and it is ordered that her affidavit tendered on a former day with depositions of Samuel Minor, Hill and Jones be also filed as part of this case to which defendant objects, and excepts.

Defendant also tendered the affidavit of Jno. B. Rodes and J. C. Sims which the court ordered filed, and to which plaintiff objects and excepts, and thereupon the motion for a new trial was submitted for judgment.

The following is a copy of affidavit filed in open court on the 25th. day of April, 1912:

Warren Circuit Court.

W. H. STEWART'S ADM'R'X
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Affidavit.

This affiant Mrs. W. H. Stewart says that her little child that Dr. Stone testified was afflicted was only in the court room twice during the trial of her cause at April Term, 1912, and that was for a few minutes the evening before the verdict and the next morning during

the argument of her counsel, and that she then held the child in her lap, at the side of the table furthest from the jury used by counsel.

30 That there is nothing peculiar in the appearance of this child except her eyes, which have not a look of intelligence usual to bright children. She says that in fact her child is an imbecile, so far as talking goes, that it could not walk for three years, and now can only say "mamma" and "Papa."

Sworn to before me by Mrs. W. H. Stewart over the telephone, April 25th, 1912.

O. A. ROUP, *C. W. C. C.*

The following is a copy of affidavit filed in open court on the 25th day of April, 1912.

Warren Circuit Court.

W. H. STEWART'S ADM'R'X, Pl'ff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Def't.

Affidavit.

Affiants, Jno. B. Rodes, and J. C. Sims, state that they were attorneys for the defendant, Louisville & Nashville Railroad Company, conducting the trial of the above styled cause at the April term of the Warren Circuit Court, and that they were present during the argument of B. F. Procter, attorney for the plaintiff; that during the trial the court had permitted over the objection of defendant's counsel Dr. T. W. Stone to refer to one of the children of Mrs. W. H. Stewart as an afflicted child; that during the argument of the case Mrs. Stewart sat with the afflicted or imbecile child about four years of age, upon her lap and about 20 feet from the jury; that when Mr. B. F. Procter arose to speak, the said Mrs. Stewart arose with her chair and moved up so that she sat by the side or immediately in the rear of Mr. Procter as he was speaking; that when he was speaking he referred to the child pointing to it, in the presence of the jury, as an imbecile; that at the time, counsel for defendant objected in the presence of the jury, and the court did say to the jury that they could in this

31 case only find damages to the estate of W. H. Stewart; that Mrs. Stewart, with the imbecile child in her lap, continued to sit during the entire argument of her counsel at the side or immediately in the rear of said counsel, and in near proximity to the jury; that said imbecile child showed upon its face and by its action that it was an afflicted child; that said imbecile child together with two other children of plaintiff, had been in the court room the greater part of the entire trial of this case.

JAS. C. SIMS.
JNO. B. RODES.

Subscribed and sworn to before me by J. C. Sims and Jno. B. Rodes, this April 24, 1912.

O. P. ROPER,
Examiner Warren County.

The following is a copy of an order entered in open court on the 27th day of April, 1912:

Warren Circuit Court.

W. H. STEWART'S ADM'R'X
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Order.

This cause having been submitted on Defendant's motion for a new trial, adjudges and orders that said motion be and is overruled, to which ruling the defendant excepts and prays an appeal to the Court of Appeals of Ky. which is granted; and defendant is given by consent of parties until and including the 10th. day of the next civil term of this Court to be held in October 1912, to tender a bill of exceptions herein, together with the official stenographer's transcript of the testimony upon the trial of this cause, which she is now ordered to make and file or lodge with the papers of the case.

32 The following is a copy of an order entered in open court on the 21st. day of October, 1912:

Warren Circuit Court.

W. H. STEWART'S ADM'R'X
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Order.

On this day came the defendant, the Louisville & Nashville Railroad Company, and tendered its bill of exceptions herein, together with the official stenographer's transcript of the testimony its carbon thereof, identified and marked with the letter "X", and moved that each and all of same be filed and the court took the same under advisement and upon consideration directing that the same be marked tendered and offered to be filed on this day.

The following is a copy of an order entered in open court on the 8th. day of November, 1912:

Warren Circuit Court.

W. H. STEWART'S ADM'R'X
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Order.

The defendant having on the first day of this term of court, to-wit, October 21, 1912, appeared in court and tendered its bill of exceptions

herein, together with the official stenographer's transcript of the evidence identified and marked "X", and the same having been taken under advisement, and examined and approved by the Judge, it is now ordered that said bill of exceptions and transcript of said testimony be and they are now filed and made a part of the record without being spread on the Order Book.

33 The following is a copy of the bill of exceptions tendered and offered to be filed October 21, 1912, and filed in open court on the 8th. day of November, 1912.

Warren Circuit Court.

W. H. STEWART'S ADM'R'X
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Bill of Exceptions.

Be it remembered that on the trial of this case at the June term 1912, of the Warren Circuit Court before the Honorable McKenzie Moss, Judge, and the jury, the evidence was taken by Mrs. Belle Galloway, Official Stenogarpher of this Court, and her transcript of the evidence, together with exceptions and objections therein both as to the competency of witnesses and testimony certified to by her and approved by the Judge of the Court, is made a part of this bill of exceptions the same as if copied in full herein. Said transcript of evidence contains all the evidence given on the trial of this action, together with all exceptions made thereto, rulings had and exceptions taken, and the same is filed herewith in duplicate as part hereof and for identification Marked "X". Said transcript marked "X" for identification contains all the evidence introduced and heard and offered to be introduced and refused as well as papers and exhibits offered and used as evidence on the trial of the above styled cause.

34 Be it further remembered that at the conclusion of plaintiff's testimony and at the conclusion of all the testimony the defendant moved the court to instruct the jury peremptorily to return a verdict for the defendant, which motions the court overruled, to which rulings the defendant excepted at the time and still excepts.

Be it further remembered that at the conclusion of all the testimony in the case the plaintiff, moved the court to give to the jury instructions B. C. D. and E., which are as follows, to-wit:

Instruction "B."

The court instructs the jury that if they believe from the evidence that on the occasion in controversy the defendant's agents and employees in charge of its train, or any of them did with negligence operate and manage the train upon which plaintiff's intestate, W.

H. Stewart, was serving as an engineer, so as to cause him to fall against the cab or engine and that he died as a natural and proximate result of said negligence, they shall find for plaintiff such a sum as will fairly compensate the surviving widow and his three infant children for his death, if it occurred wholly or in part from the negligence of any of the servants or agents of defendant as aforesaid, not to exceed the sum of Thirty-five Thousand Dollars.

Instruction "C."

The court further instructs the jury that if they believe from the evidence that plaintiff should recover for the negligence of defendant's agents and servants as set out in instruction No. 1, if any, and further believe from the evidence that said Stewart was himself negligent, and but for his own contributory negligence he would not have been hurt, then the jury may reduce the amount of plaintiff's recovery in proportion to the amount of negligence attributable to said Stewart.

Instruction "D."

The court further instructs the jury that if they believe from the evidence that an emergency existed, but the use of the emergency application was not necessary nor believed to be necessary by the flagman in the exercise of a reasonable judgment in the prudent and careful operation of the train for the purpose of preventing an injury to the property of defendant they should find for plaintiff as set out in instruction No. 1.

Instruction "E."

The court further instructs the jury that plaintiff's intestate in entering the services of defendant assumed only such risks as are usual and necessary in the prudent and careful operation of the train, and unless they believe from the evidence that defendant's agents and servants were managing said train prudently and carefully at the time the emergency was applied, or if they believe from the evidence that there would have been no necessity for the use of the emergency but for the preceding negligence, if any, of defendant's agents or any of them, they should find for plaintiff as set out in instruction No. 1.

The defendant objected to the giving of these instructions and each of them and its objection was sustained and said instructions and each of them were refused. To the refusal of the court to give said instructions and each of them the plaintiff excepted at the time.

At the same time the defendant moved the court to give to the jury instruction marked "A", which is as follows, to-wit:

Instruction "A."

The court instructs the court that when the plaintiff's intestate, William H. Stewart, entered the service of the defendant Railroad

Company as engineer upon the train mentioned in the pleadings, he assumed all the ordinary risks and hazards incident to that employment; and if the jury further believed from the evidence that flagman O. L. Hill stopped the train upon which said Stewart was serving as engineer by the use of the air valve in the rear of the caboose, when it was necessary so to do, or when said flagman believed in the exercise of a reasonable judgment it was necessary so to do in order to preserve property from injury or damage; and further believe that such stoppage of said train naturally and proximately resulted in the injuries to said Stewart, if any, complained of in the petition,—then the law is for the defendant and the jury shall find for the defendant.

The plaintiff objected to the giving of this instruction and her objection was sustained and said instruction refused. To the refusal of the court to give said instruction the defendant at the time excepted and still excepts.

Be it further remembered that at the conclusion of all the testimony the court on its own motion gave to the jury instructions Nos. 1, 2, 3, 4, 5, 6, and 7, which are as follows, to-wit:

Instruction No. 1.

The court instructs the jury that if they believe from the evidence that on the occasion in controversy that the defendant's agents and employees in charge of its train, or any of them, did with negligence, operate and manage the train upon which plaintiff's intestate, W. H. Stewart, was serving as engineer, so as to cause
37 him to fall against the cab or engine, and injure him, and that he died as the natural and proximate result of said negligence, if any, they shall find for plaintiff such a sum as will fairly compensate his estate for his death, if it occurred wholly or in part from the negligence, if any, of the servants or agents of defendant as aforesaid, not to exceed the amount sued for, to-wit: $35,000.

Instruction No. 2.

The court instructs the jury that under the rules of defendant's Company, it was the duty of the flagman, O. L. Hill to apply the emergency air brake by the use of the angle-cock on the rear of the train, only when necessary to avoid injury to life or property; and if they believe from the evidence that at the time said Hill applied said emergency air brake, it was not necessary, nor believed by the flagman to be necessary in the exercise of a reasonable judgment in the prudent and careful operation of the train, to apply said emergency air brake to avoid injury to life or property, and shall further believe from the evidence that plaintiff's intestate received the injury which resulted in his death, as the direct and proximate result of the application of said emergency air brake, then they should find for plaintiff.

Instruction No. 3.

The court further instructs the jury that in estimating the damages aforesaid, if any, they may take into consideration the capacity of said Stewart to earn money, the probable duration of life, his habits or industry, and sobriety and his skill in business in which he was engaged, but his habits of industry and sobriety are not to be considered by them except for the purpose of showing his power to earn money.

38 Instruction No. 4.

The court instructs the jury that in the operation of defendant's train it was the duty of plaintiff's intestate as engineer to exercise ordinary care for his own safety and if he failed to exercise such care and his own negligence contributed in any way to prejudice the injuries, if any, complained of in the petition, then to the amount of such negligence, if any, attributable to said Stewart, the jury shall diminish the damages, if any, which may be found by them, if any at all, under these instructions.

Instruction No. 5.

The instructs the jury that when the plaintiff's intestate entered the service of defendant company as engineer, he assumed all the ordinary risks and hazards incident to that employment and if the jury further believe from the evidence that flagman O. L. Hill stopped said train by the use of the air valve in the rear of the caboose, when it was necessary so to do, or when said flagman believed in the exercise of a reasonable judgment, in the prudent and careful operation of said train it was necessary so to do, in order to avoid injury to property; and further believe that said stoppage of said train naturally and proximately resulted in the injury, if any, to said Stewart, complained of in the petition, then the law is for defendant and the jury shall so find, unless, however, they shall further believe from the evidence that the necessity, if any, for the application of said emergency air brake, had been brought about by defendant's agents or servants in the negligent operation of said train prior to the application of said brakes in which event they will find for plaintiff.

Instruction No. 6.

39 The court further instructs the jury that by negligence as used in the instruction is meant the failure to use such care as a person of ordinary prudence would exercise under the same or similar circumstances.

Instruction No. 7.

Nine of the jury may find a verdict but if less than the entire jury agree then those who do agree must sign the verdict.

To the giving of each of these numbered instructions the defendant and the plaintiff both excepted at the time and defendant still excepts.

The above instructions as set out herein are all the instructions that were offered, given or refused on the trial of this case.

Be it further remembered that in the course of the argument before the jury made by B. F. Procter, counsel for the plaintiff, he pointed and referred to a little child of the plaintiff sitting in the lap of the plaintiff and in the immediate presence of the jury, as an afflicted and imbecile child; that at the time defendant by counsel objected in the presence of the jury, and the Court said to the jury that they could find damages only to the estate of W. H. Stewart, to all of which defendant excepted at the time and still excepts.

Be it remembered that at the conclusion of plaintiff's testimony, to-wit, on April 11, 1912, the defendant offered and moved the court to file an amended answer, to which the plaintiff objected and the court sustained said objection and overruled defendant's motion and declined to file said amended answer; to which ruling of the court defendant excepted at the time and still excepts. Said amended answer is attached hereto as part hereof marked "E. Z." and is in words and figures as follows, to-wit:

Warren Circuit Court.

WM. H. STEWART'S ADM'R'X, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Amended Answer.

At the conclusion of plaintiff's testimony and without waiving any former motions or demurrer herein or its motion for a peremptory instruction, comes the defendant and by leave of court amends its answer herein to conform to the proof.

Now to conform to the proof the defendant further answering states, that in entering the service and employment of the defendant, plaintiff's intestate assumed the ordinary risks of such service, and that among them were the ordinary and usual jerking and jarring of the train and stopping and starting of the train which ordinarily and necessarily causes jerks and jars; that among such usual and ordinary risks so assumed by said plaintiff's intestate was the stopping of the train by the use of the air valve in the rear of the train, which usually, ordinarily and necessarily caused the train to jerk and jar; that the flagman, O. L. Hill, at the time and place referred to in plaintiff's testimony did use the air valve in the rear of said train and stop the train, thereby causing said train to jerk and to jar as was usual and ordinary and necessary under such circumstances and the risk of being moved or thrown under such cirsumstances was one of the usual and ordinary risks assumed by plaintiff's intestate when he entered the defendant's employment.

Defendant states that when said Hill used said air valve to stop said train it was necessary to do so for the purpose of preserv-
41 ing property from injury and damage, and in the exercise of a reasonable judgment said Hill believed it to be necessary to so stop said train for the purpose of preserving property from injury and damage, and the stoppage of said train under such circumstances in the urual and ordinary manner as was done by said Hill was one of the usual and ordinary risks which the plaintiff's intestate assumed when he entered the services and employment of the defendant.

Defendant further says that said Stewart's alleged injury, if injured at all, which it denies, was the result of the jerking and jarring of the train under the circumstances as above set out and was an ordinary risk necessary in the usual and ordinary operation of the train, which was assumed by plaintiff's intestate when in defendant's service.

And defendant pleads the said assumption of said risk by plaintiff's intestate as a bar to his action.

Wherefore it prays to be dismissed with its costs, and for all proper relief.

SIMS & RODES.

Be it further remembered that on the trial plaintiff offered to read the deposition of O. L. Hill to which defendant objected and the court excluded same, to which plaintiff excepted.

Said deposition will be copied a little further on in this record.

The jury having returned a verdict for the plaintiff and the judgment having been rendered thereon defendant filed written grounds and moved the court to vacate and set aside said judgment and grant it a new trial, which motion and grounds were overruled, to which ruling the defendant excepted at the time and still excepts and prayed an appeal to the Court of Appeals, which was granted. Now comes this defen*f*ant and tenders this bill of exceptions and also a transcript in duplicate of the official stenographer's report of
42 &43 the evidence and on its motion said bill of exceptions is examined, signed, attested and approved by the court and said transcript of evidence is examined, signed, attested and approved by the judge; and it is now ordered that they be filed and made a part of the record without being spread on the Order Book; and it is now certified that this bill of exceptions with said transcript of evidence contains all the evidence in this case.

McKENZIE MOSS,
Judge of the Warren Circuit Court.

Attested, examined and approved.

44 Warren Circuit Court.

Mrs. JANETTE STEWART, Adm'x, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Transcript of Testimony.

Be it remembered that upon the trial of the above styled cause in the Warren Circuit Court, the following oral testimony was introduced.

Witness being duly sworn testified as follows:

Testimony of Mrs. W. H. Stewart.

(Direct examination by B. F. Proctor, Att'y for Pl'ff.)

Q. Mrs. Stewart, Where do you live?
A. In Bowling Green.
Q. What is your age?
A. I am thirty-one.
Q. When were you married?
45 A. In 1902.
Q. What was the name of your husband?
A. W. H. Stewart.
Q. Where was he raised?
A. In Bowling Green.
Q. What was your maiden name?
A. Miss Janette Sands.
Q. When did your husband die?
A. September 7th.
Q. What year?
A. In will be four years this September.
Q. September 1908 was it?
A. Yes sir.
Q. Where did he die?
A. In Bowling Green.
Q. How many children did he leave?
A. Three.
Q. These children were born to you and him after your marriage?
(Obj. by Att'ys for Def't. Obj. overruled, to which Def't excepts.)
A. Yes sir.
Q. What is the age of your oldest child?
(Obj. by Att'ys for Def't. Obj. overruled, to which Def't excepts.)
46 A. He was nine years old the 10th of March.
Q. What is the age of the next child?
A. Seven years old the 21st of March.
Q. What is the sex of the oldest child?
A. Boy.

Q. Next oldest?
A. Boy.
Q. The sex of the youngest?
A. The two oldest are boys and the youngest is a girl.
Q. What is the age of the girl?
A. Four years old the 9th of December.
Q. Where did your husband die?
A. In Bowling Green.
Q. How long had he been running for the L. & N.?
A. I don't know how long he had been running, he had been working for the L. & N. ever since he was about seventeen in different capacities.
Q. What was he doing when you were married?
A. Fireman.
Q. When was he promoted?

Obj. by Attys. for Deft. Obj. overruled, to which Deft. excepts.)

Q. When was he made engineer, and how long did he run?
A. I think he had been running about three years.
Q. Between what points?
47 A. Bowling Green and Paris.
Q. Was he hurt at any time, Mrs. Stewart while he was running?
A. He came in on September 5th and said he was hurt.

Obj. by Att'ys for Def't as what he said.)

(The Court here dismisses the jury from the room for a brief space of time until the question as to whether the witness may be permitted to answer as to what her husband may have said, can be determined.)

In the absence of the jury the witness testifies as follows:—

(Direct-examination by B. F. Procter, att'y for pl'ff, on the voire dire:)

Q. Did Mr. Stewart come home and state that he had been hurt?
A. Yes sir, he said that he had been hurt and went up next day to see the doctor and got some medicine, and they sent for him the next day to go out on the 8th and he didn't feel like going but they were short of men.
Q. Did he tell you about how he was hurt when he came back on September 5th?
A. No sir.
Q. What did he say to you about it?
A. He said "they stopped the train and I got my head hurt, I don't know whether that is the cause or not, but I am going to see the doctor, I feel awful bad."
48 Q. When did you see him prior to that and how was he feeling?
A. He was feeling all right, was feeling fine all summer. I never heard him complain at all.
Q. How long had he been out on the run?

A. Went out on the 2nd and came in on the 5th. There was different times he would come back if he would make a through run.

Q. What did he tell you afterwards, did he make any statement to you about the condition of his health or suffering or pain?

A. After that I asked him and he told me how it was.

Q. When was it?

A. On the 5th when he came in, but afterwards he explained to me how it was.

Q. When was it that he explaind it to you?

A. After he went out on the 8th and made these turn arounds to Guthrie and come back into Bowling Green, came back with his shoulder severely hurting him and said if the woman at the boarding house hadn't been so good to him he would have laid off and come home, and he told me about getting his shoulder hurt up against the engine cab and he said "the brakesman stopped me from the caboose" and I said, "What did he do that for"? and he said, "Ask him, I don't know, it was uncalled for, I don't know."

Q. He first told you September 5th and then went into details about it when he came back from Paris?

49 A. Yes sir, when he came back from Paris.

Q. Did he complain from that time until the time of his death or not?

A. He never was well after the 5th until he was paralyzed.

Q. Did he express himself to you about suffering frequently?

A. Why certainly.

Q. When was he paralyzed?

A. On the 22nd or 23rd. I think the 23rd.

Mr. Procter here cites authorities to the Court bearing upon this question of hearsay testimony as follows:

Also reads Rule 104. Also reads Rule 44, as follows:—"44. Three short blasts of the whistle when the train is standing (to be repeated until answered as provided in Rule 61) is a signal that the train will back. Rule 104 is as follows:—

50 104. "When a train is being pushed by an engine (except when shifting and making up trains in yards) a flagman must be stationed in a conspicuous position on the front of the leading car, so as to perceive the first sign of danger and immediately signal the engineman.

Att'ys for Def't object to the reading of said rule, upon which the Court rules that Mrs. Stewart may be permitted to testify to the bare fact that he received an injury on his trip, to which ruling Att'ys for Def't except.

Q. Mrs. Stewart, I will ask you now in the presence of the Court, to tell what your husband said to you when he came home?

A. That would be right hard to do, of course anybody talks and says a good many words that they would not remember afterwards. He just said—well, he was complaining and said, "I feel awful bad, I felt awful bad this trip," and I says, "what was the matter?" and he said, "I got hurt and am going to see the doctor," and I says, "Did you get hurt bad?" and he says "No, I don't guess, but I

am going to see Dr. Stone" and of course we talked about it just like a family would, but I don't remember anything else.

Q. What time was this?

51 A. On the 5th when he came in.

Q. How long after he got in before he went to see the doctor?

A. I can't say whether it was that evening or the next morning.

Q. When was it that he explained to you for the first time that this man angle cocked him?

A. After he went down the road and came back, and I asked him how he got hurt and he told me. He was a man that never railroaded at home at all, never said anything about railroading unless I asked him.

(Objection by Att'ys for Def't, to which objection the Court rules as follows: "The Court is of the opinion that Mrs. Stewart should be permitted to state the bare fact, if it is a fact, that her husband when he returned from the trip on September 5th was complaining of being sick or having been hurt, and that all of the details related by her husband to her on that or any other occasion as to how he was injured, or the manner of his injury is not competent." To that part of the ruling which permits the witness to state that her husband was feeling bad and that he had been hurt, Defendant excepts. And to the ruling of the Court holding incompetent the rest of her testimony on that point, the Plaintiff

52 excepts.)

Afternoon Session.

(Jury is now permitted to return to the Court Room.)

Q. Now Mrs. Stewart, tell the jury the condition of your husband from September 5th up to the time of his death just in your own way?

A. Well, he just seemed to be complaining from the time he would come to the house, with his head and shoudler hurting him from the hurt that he got on the road.

(Obj. by Att'ys for Def't. Obj. overruled, to which Def't excepts.)

Q. Go ahead.

A. Then from that on he was complaining, even down the road, and he would come in and tell me about it.

Q. Just tell his condition.

A. He was not bedfast but he didn't feel like working, still he thought you know——

(Objection sustained.)

Q. Just describe in a general way his condition as near as you can without stating what he said?

A. He just complained of a numbness of his arms and

53 shoulder and head hurting, and that is all that he complained of on up to Friday before he was paralyzed on the 23d, that was his last trip and he was complaining worse than ever and had to lay off.

(Def'ts move the Court to exclude the above answer from the jury which is overruled, and to which Ruling Def't excepts.)

Q. What day of the week did he die?
A. Sunday.
Q. What was his condition when he came in from his last trip?
A. Suffering severe pain from his head and shoulder.
Q. What day of the month?
A. It was on Friday before the 23d was on the next Tuesday, it was about the 20th.
Q. How many days before his death was he confined to his bed?
A. From Tuesday until Sunday.
Q. You spoke of paralysis, tell how that occurred?
A. Gradually, commenced with numbness and then with his tongue that morning, Tuesday morning when he got up he complained of it and seemed to feel so much worse and from that on, he laid down after dinner and when he got up he couldn't speak hardly at all only just a few words, and I sent for the doctor and he said that is was paralysis.

(Objection sustained as to what the doctor said.)

Q. What was his condition from Tuesday until the Sunday
54 following, the day of his death?
A. After Tuesday night he was unconscious until he died only he knew on Wednesday what I said but he couldn't answer me, and he knew what the doctors said but he couldn't answer them.
Q. You say he was unconscious from Tuesday night until his death?
A. He never spoke a word after Tuesday night.
Q. Did he lose the sense of taste that you know of?

(Objection sustained.)

Q. How was his appetite, was he able to eat?
A. He eat a little but said he couldn't taste anything that he was eating.

(Objection sustained as to what he said about what he ate.)

Q. Now what was the condition of his health prior to Sept. 5, 1908?
A. He was in good health all summer.
Q. You had been married to him how long then?
A. I expect six years or more at that time.
Q. During the time that you had been married to him how many days had he been confined from sickness?
A. He never was in bed but once and he had a spell of the grip in the spring.
Q. Did he recover from that?
A. Oh, yes, and that was the only sickness that he had ever
55 had since we had been married.
Q. What were his habits, what sort of a man was he as to labor and habits generally?

(Obj. by Att'ys for Def't. Obj. overruled to which Def't excepts.)

A. Well, he was a sober, straightforward man, and he made a good living that is about all I can say.

(Def't moves to exclude the above answer from the jury, which is overruled, to which ruling Def't excepts.)

Q. Was he economical or extravagant, how was he in money matters?

A. I guess he was as economical as he could be, he had to be and support the family.

(Obj. by Att'ys for Def't. Obj. overruled, to which Def't excepts.)

Q. How was he in the rearing of his family, how was he in his attentions to his children and to his famiiy?

(Obj. by Att'ys for Def't. Obj. overruled, to which Def't excepts.)

A. He was interested in his family.

56 Q. What degree of attention did he give you in looking after and helping to rear these children?

(Obj. by Att'ys for Def't. Obj. overruled, to which Def't excepts.)

A. As good as any father could be.

Q. What did you say was his wages?

A. I expect it would range from $135.00 to $160.00 per month according to the runs that he caught.

(Counsel for Def't moves to exclude all that portion of her testimony relating to any pain or suffering of W. H. Stewart or that after the injury spoken of he suffered pain, which is overruled by the Court, to which ruling Def't excepts.)

Testimony of Mr. T. A. Sorrells.

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. Where do you live?

A. Bowling Green.

Q. How long have you lived here?

A. *Often* and on about six years.

Q. Where were you raised?

A. Tennessee.

Q. What part of Tennessee?

A. Lincoln County.

57 Q. What experience have you had as a railroad man?

A. Six years.

Q. In what capacity?

A. Fireman.

Q. Do you know W. C. Minor?

A. Yes sir.

Q. Do you know H. T. Jones?
A. Yes sir.
Q. Did you know W. H. Stewart?
A. About two years.
Q. Were you with him on September 5th, 1908 when he was said to have been hurt on the siding at Cumberland City?
A. Yes sir.
Q. Who constituted his crew?
A. Jones, Hill, Minor, Stewart, and myself.
Q. Are they the same parties I have just mentioned here and gave their initials?
A. Yes sir.
Q. Where had your train come from?
A. Paris.
Q. Where to?
A. To Bowling Green.
Q. Do you know what time you left Paris?
A. Do not.
Q. Tell the positions of the different men on this train, what position each man held?
A. Hill was flagging, and Jones was conductor, Minor was
58 head brakeman, Stewart was engineer, and I was the fireman.
Q. Describe to the jury what position you and Stewart occupied on that train, in what part of the train?
A. On the engine.
Q. Coming North was he on the right or left hand side of the engine?
A. On the right.
Q. Your position was where?
A. Down in the deck.
Q. On the left hand, or deck?
A. I occupied the deck when I was firing.
Q. And then when the engine was moving where were you, when you were firing you occupied the deck, and when it was running where were you?
A. Down in the deck, had to be there to fire.
Q. Describe to the jury the location at Cumberland City, how many side tracks?
A. One.
Q. Do you know the length of that?
A. I do not.
Q. Do you know about how many cars it would hold?
A. No sir, I do not.
Q. Just tell the jury in your own way what occurred at Cumberland City, and if you took the siding there at Cumberland City to meet any trains or for any trains to pass, just in your own way tell all that was done there, the switching and movement of the trains?
59 A. We went to Cumberland City for # 103, and the side track would not hold us, we shoved the cars a little too far out and it wouldn't clear 103 and the flagman went out to flag 103, and

we got a signal to back up, and we backed up and the flagman angle cocked us and threw the engineer up against the car so he said and hurt his shoulder.

(Objection by Att'ys for Def't.)

Q. Did the engineer say it right there at the time?
A. Yes when I went over on that side of the engine.
Q. How long afterwards?
A. About fifteen seconds.

(Objection overruled to which Def't excepts.)

Q. Go on and tell all that occurred there?
A. I went over and asked him what was the matter, and he said the flagman angle cocked him and threw him up against the cab and hurt his shoulder and head, and that was all that was said, and he got down off the engine and was talking to the conductor, and that was all he said to me about it in Cumberland City.
Q. He said to you that it threw him up against the side of the cab and hurt his head?

(Obj. sustained, as witness had already stated that.)

60 Q. What effect did it have upon your train, the angle cocking that he done?
A. A sudden stop.
Q. What do you call the application of the air at that time?
A. Emergency.
Q. Was that in your judgment the proper application of the air for the switching that you were doing?

Att'y for Def't objects to the foregoing question, whereupon Mr. Procter, Att'y for Pl'ff, reads Rule 104 to the Court, which is as follows: "When a train is being pushed by an engine (except when shifting and making up trains in yards) a flagman must be stationed in a conspicuous position on the front of the leading car, so as to perceive the first sign of danger and immediately signal the engineman."
The Court, after the Rule being read, sustains Defendant's objection, to which ruling Plaintiff excepts and makes the following avowal: "We expect the witness to state, "No sir, it was not proper."

Q. Now Mr. Sorrells, I understand you to state that that train was put into emergency from the rear, is that right?
A. Yes sir.
Q. Where were you at the time?
A. In the engine.
Q. How far from Stewart?
A. On the left side and he was on the right hand side.
Q. How many feet would you say that was?
61 A. I don't know, 3 or 4 steps I reckon across the deck.
Q. What were you doing at the time the train went into emergency?
A. Ringing the bell.

Q. What effect did it have on your train?
A. A sudden jar, a jerk, a jar rather.
Q. What was the engineer doing at the time?
A. Backing up the train.
Q. Who was giving him the signals to back up?
A. The conductor.
Q. Where was the conductor?
A. Standing on the main track.
Q. What was the position of Mr. Stewart at the time?
A. He was up in the cab.
Q. Was his head in or out of the window?
A. I was on his side of the engine then and when the conductor gave the back up signal his head was out, that was his position before I went to ringing the bell.
Q. How long was it after you left him hanging out of the window before this emergency came?
A. Long enough to walk across the deck and ring the bell.
Q. What position should he have had at this time?

(Obj. by Att'ys for Def't. Obj. overruled, to which Def't excepts.)

A. He should have been looking out for the signal.

62 Q. If you can, tell all that you now remember, the words that passed between you and Stewart when you went across immediately after the application of the emergency?
A. I asked him what was the matter and he said that the flagman angle cocked him and hurt him, bumped his head against the cab and hurt his shoulder.

(Obj. overruled; to which Def't excepts.)

Q. To refresh your recollection, did you not ask him at the time about the brakeman trying to kill somebody, if there was any such conversation, what did he say?
A. I never asked him that.
Q. If that in substance passed between you, what was it?
A. Well, I was on the other side of the engine when it occurred.
Q. When you passed over and had a conversation with him, if he said anything about killing any body, tell what it was?

(Obj. overruled; to which Def't excepts.)

A. He said he must be trying to kill somebody, is about all that he said.
Q. Was your train in the clear at the North end at the time you started backing?
A. No, sir.

Q. For what purpose did you go in at the South end?
63 A. To let 103 by.
Q. What time did you get in there?
A. I reckon we got in the side track about 9:25.
Q. Do you know what time 103 was due there?
A. Some time between 9:30 and 9:35.

Q. When the train was angle cocked from the rear what was the extent of the jar?
A. Why it was just a jar, that was all there was to it.
Q. A hard jar, or a soft jar?
A. Neither hard nor soft, but medium.
Q. It was an emergency jar, wasn't it?
A. Yes, sir.
Q. What was the signal he blew before he started back?
A. Three blasts of the whistle.
Q. Who gave him the signal to back?
A. The conductor.
Q. You were over ringing the bell?
A. Yes sir.
Q. What effect did that jar have on you?

(Obj. overruled; to which Def't excepts.)

A. I was standing just inside of the cab ringing the bell, and it overbalanced me and I fell up against the tank.
Q. After this emergency was applied what did you have to do with your train before you could remove it?
A. He didn't have to do anything.
64 Q. Didn't he have to fill his train, or pump up his train with air?
A. The train had to pump up.
Q. Were you in the clear when you stopped North?
A. I don't remember, I suppose we were though.
Q. Were you in the clear at the South?
A. No sir.
Q. When did you notice it?
A. After we was angle cocked.
Q. You don't know the length of the siding?
A. No sir, I was not back there at all when it stopped, and I don't know the length of the siding.
Q. How fast was your train backing?
A. I don't have any idea how fast. It was very slow.
Q. Is this the Book of Rules in effect at that time, the Air & Signal Book?
A. Yes sir.
Q. Is this another Book of Rules in effect at that time for the Transportation Department?
A. It is.
Q. How far did you back Mr. Sorrells, if you remember, in obedience to that back signal?
A. I don't remember how far we backed, we backed up enough to let 103 down the main track, but I don't know how far that was.
Q. You backed up far enough to let 103 down the main track?
A. Yes, sir.
65 Q. Do you think that you were in the clear when he applied that emergency?
A. I don't know, I was not on that side when he applied it.

Q. What sort of an engineer was Mr. Stewart? What sort of a man was he as an engineer?

(Obj. by Att'ys for Def't. Obj. overruled; to which Def't excepts.)

A. Why he was as good as any other man I ever fired for.
Q. You are still in the employ of the Railroad Company?
A. Yes sir.

(Cross-examination by J. C. Sims, att'y for def't:)

Q. You have stated that when you reached Cumberland City that you took the side track there for #103. It was going South?
A. Yes sir.
Q. You entered the side track from the (not finished)——
A. Yes sir.
Q. Do you remember how many cars you had in your train that morning?
A. I don't remember how many.
Q. Your train was a freight train?
A. Yes, sir.

66 Q. And when you entered that side track from the South switch was there any cars ahead of your engine on that side track when you got to the upper end of the switch?

A. Yes sir.
Q. And as I understand when you got in on the side track that some of the cars which were ahead of your engine were not in the clear at the North end of the main track?
A. Yes sir, some of them were not in the clear.
Q. And the purpose of backing was to get the cars at the North end in the clear for 103 to pass?
A. Yes sir.
Q. What character of train was 103?
A. Passenger train.
Q. At the time you commenced to back your train after you had gone into the siding where were you?
A. In the engine on the left hand side.
Q. And the engineer on the right?
A. Yes sir.
Q. When you were on the left hand side you couldn't see each other could you?
A. Yes sir where he was sitting out at the right of the engine and I was standing in the back of the cab and could see.
Q. If you are up in the cab you can't?
A. No sir, when we are up in the cab we can't.
Q. Why?
A. The boiler is there.

67 Q. In order for you to see the engineer on the right hand side you would have to be back in the back wouldn't you?

A. I would have to be down, or climb over the boiler. In some engines you can see each other.
Q. On this engine how was it?

A. You couldn't.

Q. When this engine began to back did you see the man that gave the signal?

A. Yes sir.

Q. And that was the conductor, Jones?

A. Yes sir.

Q. Which side was he on?

A. Right hand.

Q. And I believe you stated standing on the main track?

A. Yes sir.

Q. And you were on the right hand side?

A. Yes sir.

Q. And when the signal was given by the conductor to back, you then went on the left hand side?

A. Yes sir.

Q. And you were ringing the bell as I understand?

A. Yes sir.

Q. That was your duty?

A. Yes sir.

Q. Now did you see the engineer at the time he began to back, did you see the engineer at that time?

A. No sir, couldn't see him.

68 Q. Did you see the engineer at the time the emergency was applied and the train stopped?

A. No sir.

Q. Why?

A. I was on the left hand side.

Q. So of your own personal knowledge you don't know what happened?

A. No sir.

Q. You have only got his word for it?

A. Yes.

Q. His position at the time the emergency was applied on the right hand side you do not know of your own personal knowledge?

A. No sir, not at the time the emergency was applied.

Q. Because you didn't see him?

A. No sir.

Q. If at the time the emergency was applied the engineer was looking out the cab window his left side would be next to the front part of the engine?

A. It is owing to which way he was looking out. He can look either way, he can turn and change sides.

Q. It would altogether depend on his position?

A. Yes sir, *in* the position he was in.

Q. And you don't know what that position was?

A. No sir.

Q. You were going very slow when the emergency was applied and the train stopped?

A. Yes sir.

69 Q. I believe you said you could not tell the distance you had backed after the signal was given before the emergency was applied?

A. No sir, I couldn't tell.

Q. In the operation of freight trains such as you were operating, state whether or not jerks or jars occur usually in operating freight trains?

A. Yes sir, at times.

Q. Well, now tell what kind of a jar this was when the emergency was applied?

A. Just a sudden stop.

Q. Was it any unusual jar?

A. I have had jars as hard as that at other times.

Q. Of frequent occurrence?

A. Not very often, a few times.

Q. You don't know the condition of the back of your train at the time you were backing or at the time of the emergency?

A. I do not.

Q. You didn't see back there, and was not back there?

A. No sir.

Q. You stayed on the engine all the time?

A. Yes sir.

Q. At the time the emergency was applied you didn't see the flagman at the rear end of the train?

A. No sir, I couldn't see him from my side.

Q. How long had you known Mr. Stewart before Sept. 5, 1908?

A. About two years.

Q. Hadn't you been firing with him prior to that time?

70 A. Yes sir, had been with him.

Q. Frequently?

A. Yes sir.

Q. I will show you "Engineman's Report" and will ask you if you are familiar with W. H. Stewart's signature?

A. Yes sir.

Q. I will ask you to examine the one of Sept. 5, 1908 and ask you if that shows that W. H. Stewart as engineman made a trip on that date?

A. That is his signature.

Q. Does it show that he made a trip at this time?

A. Yes sir.

Q. Where from and where to?

A. From Paris to Bowling Green.

Q. Do you remember what time you got in here on the 5th of Sept. 1908?

A. I don't remember, the card shows.

Q. Look and see.

A. Arrived in the yards 6:35, in the Round House at 7:10 P. M.

Q. Did you go out on the road with Mr. Stewart the next trip after you came in on the 5th?

A. No sir, I went out on a passenger run the next trip I went out.

Q. I show you another card dated Sept. 9th, 1908 and ask you if it was not signed by W. H. Stewart as engineer?

A. Yes sir, that is his signature.

Q. Who was the fireman with him then?
71 A. I was.
Q. Does that card show that?
A. Yes sir.
Q. From where and to where does the card show?
A. From Bowling Green to Paris.
Q. Does it show what time you got to Paris?
A. Yes sir.
Q. What time?
A. At 9 P. M.
Q. Does it show the time you left Bowling Green?
A. 9:40 A. M.
Q. Well, examine card dated 9/10, 1908, and state whether or not that card was signed by W. H. Stewart, engineer?
A. It is, this is his signature.
Q. Who was fireman with him then?
A. I was.
Q. Where was that trip, from where to where?
A. From Paris to Guthrie, and from Guthrie to Paris.
Q. You turned and returned to Paris?
A. Yes sir.
Q. What time did you get to Guthrie that day as shown by the card?
A. 8:20 A. M.
Q. What time did you return to Paris?
A. 2:35 P. M.
Q. I now show you engineman's report signed by W. H.
72 Stewart engineer dated 9/14, 1908, and ask you if that is Mr. Stewart's signature to that report?
A. It is.
Q. That trip is from where to where?
A. 247 to 164 return to Paris.
Q. What do you mean by that?
A. From Paris to Guthrie.
Q. What time did you arrive at Guthrie?
A. 2:20 A. M.
Q. What time back to Paris on the return trip?
A. 1:20 P. M.
Q. I will show you another report dated 9/16 1908 signed W. H. Stewart as engineman, is that his signature?
A. Yes sir.
Q. What trip does that report show?
A. From Paris to Bowling Green.
Q. What time does it show?
A. We left Paris at 12:30 A. M.
Q. Arrived at Bowling Green?
A. 1:50 P. M.
Q. I will now show you another report signed W. H. Stewart engineer dated 9/18 1908 and ask you if this is W. H. Stewart's signature?
A. It is.

Q. Are these signatures of the same W. H. Stewart that you were on the engine with as fireman on September 5th 1908?

A. Yes sir.

Q. What does that report show, as to what trip?

A. From Paris to Bowling Green.

73 Q. What time does it show he left Paris?

A. 1 P. M.

Q. What time did he arrive in Bowling Green?

A. 1:57 A. M. on the 19th.

Q. I now show you engineman's report signed "Engineer W. H. Stewart" dated 9/2 and ask you whose signature as engineer is on that card?

A. Mr. Stewart's.

Q. I now show you two other reports signed as engineer W. H. Stewart in 1908 and ask you whose signatures are they?

A. That is his signature to those cards.

Q. Now I will get you to examine these reports which I have shown you and state in whose handwriting those reports are made out all of them, just look through them, figures, names, and all, and state in whose handwriting those reports are made out?

A. W. H. Stewart's.

Q. From September 5th 1908 from the first card, is there any change or difference in his handwriting on those cards from September 5th up to September 18th 1908?

(Objection sustained.)

Att'ys for Def't avows that if the witness were permitted to state he would say "None whatever."

Q. In a freight train, say of thirty or forty cars, about

74 how much slack would there be?

A. Almost a car length, maybe more.

Q. What is the average car length of freight cars?

A. I can not tell you.

Q. In your judgment about how many feet would the slack be when there was thirty or forty cars?

A. Between 30 and 40 ft. I expect.

Q. If there is that much slack in a freight train state whether or not in the operation of a freight train there is bound to be more or less jars or jerks in stopping and starting trains?

A. Yes sir.

Q. Was the jar at the time your train was backing slowly and the emergency applied on that side track any more than an ordinary or usual jar incidental to the ordinary operation of freight trains?

(Objection overruled, to which Pl'ff excepts.)

A. I have had jars similar to that several times.

Q. Was it any greater than is usual and ordinary in the operation of freight trains of that character, and don't such jars frequently occur in the operation of freight trains?

A. Yes sir, we have such jars frequently.

(Att'ys for Pl'ff move to exclude the above question and
75 answer from the consideration of the jury, which is overrules, and to which plaintiffs except.)

Q. At the time the emergency was applied after you had begun to back your train, if I understood you in answer to Mr. Procter, you were ringing the bell?

A. Yes sir.

Q. Were you standing against anything, or standing in the open ringing the bell?

A. I was not standing against anything.

Q. And if I understood you, you were standing in that position when the emergency was applied, it stops immediately, and when the emergency was applied it threw you off of your balance and threw you up against the tank?

A. Yes sir.

Q. The sudden stopping of the train overbalanced you?

A. It did.

(Redirect examination by Mr. Procter, Att'y for Pl'ff:)

Q. I understood you to say to Mr. Sims that you had felt such jars as were given at that time a few times before, is that right?

A. Yes sir.

Q. Such jars are only made in case of an application of the emergency brake, are they not?

A. Sometimes an engineer can make an application and
76 draw off 10 lbs. and there will be quick action triple and make such jerks.

Q. That has the effect of an emergency jerk?

A. Yes sir.

Q. That makes a hard jerk?

A. Not such a hard jerk but an unusual jerk liable to damage property.

Q. For what reason is the use of the emergency forbidden, why is it forbidden?

(Objection sustained.)

Special Rule governing the use of Air Brake & Whistle Signals, page 18, read to the jury and offered as evidence by Att'y for Pl'ff.

Said Rule read by Att'y for Pl'ff as follows:

"The emergency or quick action must never be used unless it is to avoid injury to life or property. No excuse will be taken for its use except as stated. The necessity for its use can be readily avoided by returning the handle to lap immediately after the release of the first application, and then applying the brakes lightly before the engine reaches the exact spot desired."

Q. What is the danger in the use of the emergency brake, if any?

77 (Obj. overruled; to which Def't excepts.)

A. It is liable to pull out weak drawheads.

Q. What else?

A. A sudden jar of the train.

Q. Well, what effect does that have and what is the danger of a sudden jar such as the emergency makes?

(Obj. overruled; to which Def't excepts.)

A. I don't know, you don't know what a jar would make.
Q. Is there any danger of hurting the men on the train?

(Obj. overruled; to which Def't excepts.)

A. I don't know whether it would or not, I never was hurt.
Q. Isn't that the reason that it is forbidden in ordinary use?

(Objection sustained.)

Testimony of W. C. Minor.

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. Where do you live?
A. Bowling Green.
Q. Do you know H. T. Jones?
A. Yes sir.
78 Q. Where is his home now?
A. Paris, I think.
Q. When did he move to Paris?
A. I won't be positive, but I think sometime last fall.
Q. How long have you been in Bowling Green?
A. About eighteen months.
Q. Where were you raised?
A. In Stewart County, Tennessee.
Q. Near Cumberland City?
A. Yes sir.
Q. What is your occupation?
A. Brakeman.
Q. How long have you been braking?
A. About five years I guess.
Q. What occupation did you have prior to that time?
A. I run a train here a while since I have been on the road; I was a farmer before I went on the road.
Q. When did you begin railroading?
A. January, eight years ago.
Q. How long did you run a train during that time?
A. About three years.
Q. When did you quit running a train?
A. I don't remember just what date.
Q. How long have you been running constantly as a brakeman?
A. I can't say just how long, it has been some little time.
Q. About three years though you ran as conductor?
A. Yes sir.
79 Q. Were you in September 1908 on the train at Cumberland City when W. H. Stewart is said to have been hurt?
A. Yes sir.
Q. Who constituted the crew?

A. H. T. Jones, O. L. Hill, W. H. Stewart, Mr. Sorrells and myself.

Q. Tell what position each one occupied?

A. O. L. Hill was flagman and I was head brakeman, Sorrells was fireman, Stewart was engineer, and Jones was conductor.

Q. What was the full name of Stewart?

A. W. H., I think.

Q. What occurred on that trip at Cumberland City? Tell the jury in your own way what occurred there, and for what purpose you stopped at Cumberland City?

A. We stopped in there to head in for 103, the South bound passenger train and after we had headed in and pulled in the clear at the South end of the siding we were a little out of the clear at the North end, and we had to back up some to get in the clear at the North end to let 103 down the Main line. And while we were backing up as they started to back up they were angle cocked from the rear of the train.

Q. What would you call that stop?

A. Emergency stop, conductor's valve.

Q. Tell the jury what effect that had on the train?

A. It threw the brakes on in an emergency and stopped every car including the engine, at once.

80 Q. If it jarred your train, tell the jury what sort of jar it gave you?

A. Of course it had some jar to it, a right smart.

Q. How would you describe that jar?

A. As an emergency jar I reckon you might call it?

Q. Was it a hard jar or a light jar, or what would you term it?

A. I don't know it was a right smart jar, it was a sudden stop all at once and at one time.

Q. Describe it.

A. That is as well as I could describe it, just a sudden stop which threw the brakes in emergency stopping it all at one time.

Q. What was the effect to those cars in front of the engine were there any brakes set upon them?

A. No sir.

Q. What effect would that have upon a train, the cars without any brakes, upon the engine?

A. That would not have very much effect upon the engine, the brakes being in emergency.

Q. You gave your deposition in this case didn't you?

A. Yes sir.

Q. You were asked about those brakes coming together at that time weren't you?

A. Yes sir.

Q. Did you or not upon that occasion say that the emer-

81 gency caused a great lick or jar when the train ran together? and isn't that true?

(Objection sustained, whereupon plaintiff makes the following avowal: We expect the witness to state that the emergency caused a great jar or lick when the train ran into emergency.)

Q. What was the position of Mr. Stewart when the switching was being done?
A. Hanging out of the window, part of the body.
Q. Why was he hanging out?

(Objection by Att'ys for Def't. Obj. overruled; to which Def't excepts.)

A. Taking signals I suppose.
Q. Did you hear Mr. Stewart complain of being hurt immediately after the injury?
A. Not shortly.

(Objection by Att'ys for Def't.)
The Court: How long after the alleged injury before you saw him?
Answer: Maybe ten minutes, something like that."
The Court: "I will sustain the objection."
Att'ys for Plaintiff makes the following avowal: "He says
82 that he was hurt."

Q. You are familiar with the use of the air brakes and signals in effect at the time of this injury?
A. Fairly well, yes sir.
Q. What is the danger, if any, in applying the brakes as Hill did on that occasion?

(Objection by Att'ys for Def't. Obj. overruled; to which Def't excepts.)

A. The danger to property, tearing up some part of a train, might be.
Q. Any other danger?
A. There would be to persons if there should be any around the train and on it.
Q. What about the train crew?

(Obj. by Att'ys for Def't. Obj. overruled; to which Def't excepts.)

A. If there was any that might be on the train or about it it is liable to hurt them in some way.
Q. Do you ever apply the emergency brakes when the engineer and conductor is both on the train in charge of the train?
A. Yes sir.
Q. For what purpose should it be applied under such
83 circumstances. Under what circumstances should it be applied?

(Objection by Att'ys for Def't. Obj. overruled; to which Def't excepts.)

A. To prevent danger to property or life.
Q. Give instances of such application in your judgment that it would be proper to apply it?

(Objection overruled; to which Def't excepts.)

A. In case of a break down or a car off the track or likely to run over some one or something, you would use the brake.

Q. For what purpose were you backing this train when that emergency stop was applied?

A. To get in the clear at the North end of the siding.

Q. From what direction was 103 coming?

A. South bound.

Q. What part of your train would 103 necessarily pass first?

A. The North end.

Q. When you started backing, under the Rules and customs of the Company what should that rear brakeman have done?

(Objection by Att'ys for Def't. Obj. overruled; to which Def't excepts.)

A. He should have looked after the rear of the train and
84 if necessary open the main line switch.

Q. Well, did he open the switch?

A. I don't know whether he did or not.

Q. Did he open the switch before he applied that emergency?

A. I don't know.

Q. How did you let 103 by?

A. Backed down enough to clear the North end of the siding.

Q. Did you have to saw by?

A. Yes sir, I think we did as well as I remember.

Q. Do you remember whether or not there was any other train standing on the main when you headed in there?

A. I don't remember.

Q. Your recollection is that you did saw by 103?

A. Yes sir.

Q. Why?

A. Because the siding did not clear us.

Q. Do you remember how long you were in that siding?

A. No sir, do not.

Q. How long were you required to clear 103 at that time?

A. Five minutes.

Q. Do you think that was the full time at that time?

A. Yes sir.

Q. Then you could not as I understand clear or let 103 by without the South end of your train running out upon the main line and through that switch?

(Objection to the question by Att'ys for Def't.)
(Question is withdrawn.)

85 Q. Why was it necessary for you to saw by?

A. Because the siding did not clear the train.

Q. Then in order to do this what did you have to do with your train?

A. We had to back far enough to the South end of the siding to clear the North end of the siding.

Q. Did or not the rear end or South end have to go out upon the main track at the South?

A. I don't remember how far they backed up, it might have been that they could have backed their train right on the frog of the track.

Q. Wouldn't that have obstructed the main line?

A. Yes sir.

Q. Isn't it true that you could not with that train on the siding in addition to the cars that you brought there have both ends of your train in the clear?

A. No sir I don't think we could.

Cross-examination by Jno. B. Rhodes, of Counsel for Def't:

Q. You don't state that the South end had to be backed out on the main line?

A. No sir, I was not back there.

Q. Where were you?

A. At the North end of the siding, I flagged 103.

Q. You were at the North end of the siding and North of
86 the engine?

A. Yes sir.

Q. You were further than anybody from the South end of the train?

A. Yes sir.

Q. When you stated that you thought that your train could not clear the main track, that might be because the South end of your train the caboose approached so near the frog of the switch as not to clear it?

A. Yes sir.

Q. Show the jury that that is the main line and this is the switch, that would be the frog right there, and this would be the point of the switch?

A. Yes sir that is right.

Q. And your train might get so close down here as to get in the way of trains going on the main track, and then you would say "out of the clear"?

A. Yes sir.

Q. So your train might be entirely on the side track and yet not be in the clear entirely?

A. Yes sir.

Q. When you moved in on the side track you found that you were out of the clear on the head end?

A. Yes sir.

Q. Why was that?

A. Because that car leading to the main got too far up.

87 Q. There were several cars that didn't belong to your train up here?

A. Yes sir.

Q. But one of them got so close to the main track as to get out of the clear, so if 103 came along it might have swiped them, and yet these cars were entirely in the side track?

A. Yes sir.

Q. And you had to back down to get these cars in the clear and let 103 go by?

A. Yes sir.

Q. You were at the North end and away from where this transaction occurred?

A. Yes sir.

Q. When you got these cars in the clear at the North end then 103 could come down on the main track opposite the depot?

A. Yes sir.

Q. And then you could pull out Northward and leave the rear end in the clear?

A. Yes sir.

Q. And that is what you mean by "sawing by"?

A. Yes sir.

Q. And then 103 could pass on South?

A. Yes sir.

Q. You told Mr. Procter you didn't recollect whether or not when you came up here there was a train standing there waiting for you or not?

A. I don't remember.

88 Q. If there was such a train standing there on the main all you had to do was to come in on the side track until you cleared the South end and that train could move on South?

A. Yes sir.

Q. Now when you got up here you went North to flag 103, then your train began to back slowly South?

A. Yes sir.

Q. Did you see it when it stopped?

A. Yes sir.

Q. Is it not true that down there at Cumberland City there are a couple of roads crossing the track, both the side and main track near the depot there?

A. Yes sir.

Q. One of them is just a little North of the South switch?

A. Yes sir.

Q. You don't know how they were headed in there, just North of this road that crosses the South switch?

A. No sir.

Q. Because you were away up front?

A. Yes sir.

Q. State whether or not when you got in there on that side track it was not only your duty to clear the main track too, but to protect these crossings?

A. Yes sir.

Q. What do you mean by that?

A. To cut the cars so as to let people pass, people driving coming across there.

89 Q. And see that they ain't hurt as they pass, just simply dividing the cars?

A. Yes sir.

Q. When was it that you saw engineer Stewart there when you started up to flag 103?
A. Just as I was going out to do the flagging.
Q. Is that the last time you saw him at that particular time, before the train stopped, as it was backing up?
A. No sir I saw him as they were backing up, I just stood ahead of the train as we were backing down?
Q. Where was he?
A. In the cab window of the engine.
Q. Was he hanging out the window or do you know?
A. He had some of his body out the window.
Q. How far was he hanging out the window?
A. I can't say how much of him was hanging out of the window.
Q. Did you see the fireman?
A. I don't recollect about that.
Q. Mr. Minor, you have run on freight trains, haven't you?
A. Yes sir.
Q. State whether or not there is usual and customary in the ordinary operation of freight trains, jerks and jars, necessarily resulting from the ordinary operation of freight trains?
A. Yes sir.
Q. Incidental to the operation of such trains are there jerks and jars?
A. Yes sir any train jerks more or less when it is running.
90 Q. And in stopping and starting too?
A. Yes sir, severe ones.
Q. Is that usual and customary in the operation of freight trains on railroads?
A. Well, it occurs every day.
Q. Is there any slack in a train of cars?
A. Yes sir.
Q. About how much in a train of 34 cars?
A. Between 20 and 30 feet.
Q. In stopping a train of that sort, do the cars bump together and jerk and jar?
A. Yes sir.
Q. Do they feel that, anybody that is on the train?
A. Yes sir, they feel it more at the rear of the train than at the head end.
Q. You mean when the engineer does the stopping himself?
A. Yes sir.
Q. Isn't a train so equipped from the rear of the caboose and also the front end?
A. Yes sir.
Q. What is that instrument used for the back there?
A. The angle cock.
Q. You speak of that when it is stopped from the rear there as angle cocking the train?
A. Yes sir, and the one in the caboose is called the conductor's valve.
Q. You say you saw that train stop on that occasion?

A. Yes sir.

91 Q. State whether or not such jars and jerks, were there any jerks and jars there on that occasion?

A. It was an emergency lick, it stopped everything suddenly when the brakes went on; it stops every wheel from the engine to the caboose, and stops the train.

Q. Isn't it a fact that such jerks and jars equivalent to them are usual and customary and frequent in the operation of freight trains?

A. Yes sir.

Q. How was it proceeding, backing slow or not?

A. Slow.

Q. How slowly?

A. I couldn't say, not very fast.

Q. On a siding that way you have necessarily got to go back slowly haven't you?

A. Yes sir.

Q. Necessarily you could not operate very fast?

A. We would not there because were only going to back a short piece.

Q. And that was when the train was stopped?

A. Yes sir.

Q. Such jerks and jars are met with all the time in railroading on freight trains ain't they?

A. Yes sir.

Q. Now in giving Mr. Procter some instances a while ago when a train might be stopped by the use of the air brakes in emer-

92 gency, you don't mean to say that they were the only instances in which it could be so used?

A. No sir, not the only ones.

Q. There are causes arising all the time aren't they in which the air brake may be used in emergency?

A. Yes sir.

Q. And every case differs from the other?

A. Yes sir.

Q. And in all cases in which either property or life may be injured it may be used?

A. Yes sir.

Q. And is constantly used for those purposes?

A. Yes sir.

Q. Mr. Procter read to the jury these words a while ago: "The necessity for its use can be readily avoided by returning the handle to lap immediately after the release of the first application, and then applying the brakes lightly before the engine reaches the exact spot desired."

Aren't these words "returning the handle of the lever" and so on, don't that apply to the engineer?

A. Yes sir.

Q. There is no handle to the lever to be applied by the flagman using the angle cock in the rear?

A. No sir.

Q. And this applies to the engineer in operating a train?
A. Yes sir.

93 (Redirect examination by B. F. Procter, Att'y for Pl'ff:)

Q. You say to Mr. Rodes there that this emergency is used and that there is jerking and jarring of trains daily. There is always some jarring of trains in the running of them, isn't there Mr. Minor?
A. Yes sir.
Q. Do you mean to tell Mr. Rodes that you apply the emergency on the train every day?
A. I didn't say every day, I said it was frequently done.
Q. The emergency stop, however, is only to avoid danger to life or property?
A. Yes sir.
Q. How many times did you ever put a train in emergency?

(Obj. by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. I don't remember, I remember a good many times, but I can't tell how many.
Q. Didn't you state in your deposition that you only remembered twice that you had put the train in emergency?

(Objection sustained.)
(Att'y for Pl'ff makes the following avowal:
"We expect him to state "Yes."

94 Q. Would you regard it proper to use the emergency brake to bunch the slack in a train?

(Obj. by Att'ys for Def't. Obj. overruled; to which Def't excepts.)

A. No sir, I would not.
Q. Would you regard it proper to apply the emergency to keep a car from going across a crosing, to prevent it from blocking a crossing unless there was something on there, men, horses, property or something to be injured by it?

(Obj. by Att'ys for Def't. Obj. overruled; to which Def't excepts.)

A. No sir.
Q. Wouldn't it be a very easy thing if it had obstructed the crossing, to pull it back off of the crossing and open the crossing?

(Obj. by Att'ys for Def't. Obj. overruled; to which Def't excepts.)

A. Yes sir.

(Recross-examination by Jno. B. Rodes, Att'y for Def't:)

95 Q. If your train was backing up along this switch down here Southward, and this switch was closed and that train ran into it, it would destroy and split that switch and destroy that property?
A. Yes sir.

Q. I believe you say in all cases where it would damage property emergency is to be used?

A. Yes sir.

Q. If the switch was damaged the section crew would have to be called and it might result in injury to the coach, is that correct?

A. Yes sir.

Testimony of John Sharpe.

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. What is your occupation?

A. In the livery business and transfer business now.

Q. How long have you been in that business?

A. Fourteen years or a little over since '97.

Q. Have you ever run on the railroad?

A. Yes sir.

Q In what capacity?

A. I have broke and run a train too.

Q. For how long?

A. About seventeen years and four months.

Q. Are you familiar with the use of the air brake?

A. Yes sir.

96 Q. Are you familiar with the signals given in backing, stopping, and movement of trains in yards?

A. Yes sir.

Q. Are you familiar with the use of the air brake and air brake rules in effect in September 1908?

A. Yes sir.

Q. And the rules for the switching of trains at the same time?

A. Yes sir.

Mr. Sims asks the following questions upon the voire dire:

Q. Mr. Sharpe, you haven't railroaded any for the past fourteen years?

A. It has been a little over fifteen years.

Q. And you have been in the transfer business for nearly fourteen years?

A. Yes sir a little over.

Q. And you quit railroading before you went into the transfer business?

A. Yes sir.

Q. Since you quit operating trains there has been a great improvement?

A. I don't think there has about the air and signals, I think it is about the same now as then.

Q. You know nothing about the rules of air brakes that were in force in September 1908?

A. They hadn't changed any, if they had I hadn't heard of it.

97 Q. You had no reason to familiarize yourself with the rules?

A. There was no reason to change them.

Q. You have made no investigation of them in the last fourteen years?

A. On, no, only I see them around the depot there all the time, and have noticed on change.

Q. You haven't examined the Book of Rules as to Air Brakes that was in force and effect in 1908?

A. No sir.

(Redirect examination by B. F. Procter, Att'y for Pl'ff:)

Q. Isn't it true that you have examined the Book of Air as to use of the emergency brake, and the application of air by the different men?

A. Not unless they have a new one out, I have examined the one in use in '97 and there has been no change, I guess the air works just like it always did.

(Objection by Att'ys for Def't.)

The Court: "Unless the witness is able to state that they are the same he will investigate and find out."

98 *Testimony of John Sharpe, Recalled.*

(Examined by B. F. Procter, Att'y for Pl'ff:)

Q. You were on the stand yesterday afternoon, now I will get you to state if you are familiar with the Rule for operating freight trains?

A. Yes sir.

Q. Now what would be the proper manner of operating a train by the rear brakeman in the event that his train was on the siding such as at Cumberland City and the engineer should give back up signal and the train would not clear the crossing, and it was a meeting point for a train of superior class, the train on the crossing being a freight train, and the other a passenger train, and the rear brakesman had the switch lined up for the main track instead of for the side track, what would be the proper thing to do under the rules and customs of the Railroad Company, which were in effect in 1908?

(Objection by Att'ys for Def't. Objection sustained.)

99 *Testimony of Chester Younger.*

(Direct examination by B. F. Procter, Atty' for Pl'ff:)

Q. How old are you?

A. Twenty-three.

Q. Where do you live?

A. About a mile from the city, on the Smallhouse Pike.

Q. Where were you raised?

A. About the same place.

Q. What experience have you had as a railroad man?

A. Worked in the yards as switchman about three months from June to September, year before last, 1910.

Q. When did you run as fireman?
A. From September until December about the 15th.
Q. Have you investigated the Rules of the Company as to Rules and the effect of the use of the air and the duties of brakesmen and of engineer, as to whether or not they are the same in 1908 as when you were on the road?
A. About the same thing, yes.
Q. Are you familiar with the way in which a train should be handled and operated by the engineer, fireman, brakesmen, and conductor, using the air and the emergency application of air in September 1908?
A. If it was like it was when I was on the road I am very well acquainted with it, of course I didn't run very long.
Q. Do you regard yourself as familiar with what would be
100 the duty of this man on the side track in switching?
A. Yes sir, I do.
Q. You say from investigation that the Rules in 1908 were the same as those that were in effect when you were running in 1910?
A. The same as far as I know, I don't know so much about what they were then, but I think they are about the same as they were in 1910.
Q. Did you ever run between Bowling Green and Paris?
A. Yes sir that was my run.
Q. Are you familiar with the side track at Cumberland City?
A. Yes sir.
Q. Now are you familiar with the emergency application of air?
A. Yes sir.
Q. And the Rules governing it?
A. Yes sir.
Q. Under what circumstances is the emergency application made?
A. Well it is just made in cases——

(Objection by Att'ys for Def't upon the grounds that the Rule speaks for itself. Objection as to that point sustained by the Court.)
(Obj. is also made as to the competency of witness by
101 Att'ys for Def't.)
(The jury is now excused from the room, while the witness is examined as to the voire dire.)

(Examined by J. C. Sims, Att'y for Def't:)

Q. Did you ever serve as brakeman?
A. No sir.
Q. At no time?
A. No sir.
Q. You only served as fireman about three months?
A. Yes sir.
Q. When was that?
A. From September until December.
Q. In what year?
A. 1910.

Q. You were never examined on the Rules as to brakesmen?
A. No sir.
Q. And had no experience as a brakeman?
A. No sir.
Q. And the only other service you did in connection with the Railroad Company was switching in the yard in Bowling Green about three months?
A. Yes sir, from June until September 1910.
Q. You have never examined the Rules in regard to air that were in effect in 1908?
A. No.
Q. Never have.
A. No.

102 (Examination by Mr. Procter, of counsel for plaintiff:)

Q. I here show you a book marked "W. H. Stewart" 1908 revised, and will ask you didn't you have a copy of that same book and were governed by the same rules?
A. Yes sir, this is the same book, revised January 6, 1908.
Q. Here is another book dated December 1st 1898, I will get you to examine and see if on page 16 the use of the emergency is not prohibited just as it was in the Book of Rules of January 6th 1908?
A. Page 16 in this Book too?
A. No sir, Page 18 in that book.
A. "Emergency or quick action must never be used unless it is to avoid injury to life or property. No excuse will be taken for its use except as stated. The necessity for its use can be readily avoided by returning the handle to lap immediately after the release of the first application, and then applying the brakes lightly before the engine reaches the exact spot desired." That is in both books.
Q. This book of January 6th 1908 is a revised book?
A. Yes sir.
Q. Now I show you another book of Rules, Louisville, Ky., 1903, John P. Morton & Co., Rules for the Government of the Transportation Department, reissued August 22, 1907, and get you to state if the rules in that book governing signals and the application of air and the duties of the brakesmen and engineer
103 and fireman, are not the same as in the book of rules that you had furnished you at the time, there on page 9, and then on page 10, here are the signals, and bell cord signals, I will get you to tell *is* they are not the same as they were in your book?
A. These signals are the same.

The Court: "The question in this case is, he may be familiar with the Rules but has not had experience sufficient to know what should be done in case of emergency."

Mr. Procter: "Mr. Younger were you examined on the Rules as fireman?"
A. No sir.

The Court: "I don't think he has had sufficient experience to

know what should be done in emergency, he is a bright young man, but I don't think he is competent to testify as an expert, six months is not much experience."

Mr. Rodes: "Judge, I would like to know what question Mr. Procter wants to ask him, and I want the record to show that."

104 Mr. Procter: "Well, if the Court says that he is not competent."

The Court: "I don't think this witness is competent."

(Examination of witness continued by Mr. Procter:)

Q. Mr. Younger, are you familiar with the operation and management of trains in backing and moving on side tracks, and the use of the emergency brake?

A. Yes sir, I am.

Q. In your judgment, say that a freight train was on the side track at Cumberland City and it is necessary for 103 to pass this train, 103 was a passenger train with a superior right, and the siding would not clear the freight train, and it was necessary to do what is termed in railroading "saw-by," now in your judgment what should be done by the engineer and the men governing the operation of his train by signals?

(Objection by Att'ys for Def't for the reason that Rule specifies what should be done.)

The Court: "Here is a Rule for the application of the emergency brake which in substance provides that the emergency should be applied to prevent damage to property or life. I am inclined to believe that evidence might be introduced when the loca-

105 tion has been shown and the distance can be stated to a witness who is sufficiently qualified by experience and actual practice and operation of trains under similar circumstances, to show whether or not that was a proper or improper application of the emergency air brake, but this young man is not a competent witness, it must be a man that has had sufficient practical everyday experience, who has encountered such conditions, and have dealt with them. Objection sustained."

Att'y for Pl'ff makes the following avowal: "We expect the witness to state in answer to the question that he is familiar with the operation of trains and signals and that the rear brakeman as soon as he heard the signal given, which was three short blasts of the engine, that he should have gone back and opened the switch and then there would have been no necessity for the application of the emergency."

Q. Is the emergency application of the air a usual or unusual occurrence?

(Obj. by Att'ys for Def't. Obj. sustained.)

Att'y for Pl'ff makes the following avowal: "It is a very

106 unusual occurrence and a very dangerous thing to persons and to property, and during my experience of six months I have never seen it applied more than once or twice, and they were in extreme cases of danger."

Jury is now permitted to return to Court room.

Testimony of W. C. Minor, Recalled.

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. I will get you to state to the jury if that side track down at Cumberland City is constructed as it was in September 1908, and the same length now as it was in September 1908?
A. I think it is as well as I remember.
Q. You don't know of any changes?
A. No sir.

(Plaintiff here offers to read the deposition of O. L. Hill to jury, taken in this case, on March 30th 1912 and filed. Att'ys for Def't object to reading of said deposition, and the Court being advised adjudges that the deposition is not competent, as the witness is in attendance in court, and excludes the deposition, to which ruling the plaintiff objected and excepted.)

107 *Testimony of O. L. Hill.*

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. Where do you live?
A. Paris, Tennessee.
Q. What is your age?
A. Thirty-five years old.
Q. What is your occupation?
A. Conductor.
Q. How long have you been conductor?
A. A fraction over three years.
Q. What was your position in September 1908, Sept. 5, 1908, when W. H. Stewart is said to have been hurt at Cumberland City?
A. Flagman.
Q. Were you with the train on that occasion?
A. Yes sir.
Q. Give the different members of your crew and the positions they occupied?
A. Hugh Jones, Conductor, W. C. Minor, head brakeman, myself as flagman, Stewart as engineer, and Sorrells as fireman.
Q. Did you make the emergency application or brake on that occasion?
A. Yes sir.
Q. For what purpose did you make that application?
A. To comply with the Rules of the Company.
108 Q. Is that your only answer?
A. And to save property.
Q. For what purpose did you make that application?
A. To prevent splitting the switch.
Q. What was the movement of the train at the time?
A. Backing up.

Q. Isn't it true that you applied that emergency to stop that train from backing?

A. Yes sir.

Q. Your deposition was taken in this case, wasn't it?

(Objection sustained.)

Q. Was that your only purpose in applying that emergency?

A. To protect the switch and to keep the train off the main line, you can read it if you want to.

Q. For what other purpose?

A. To prevent splitting the switch.

Q. No other purpose?

A. That is the only one that I can see.

Q. Didn't you apply that emergency too to bunch the slack?

(Obj. by Att'ys for Def't. Obj. overruled; to which Def't excepts.)

A. It did bunch the slack, yes sir.

Q. Didn't you apply it to bunch the slack?

A. Not at all, no sir.

109 Q. For what other purpose?

A. And to prevent the train going on to the main line and splitting the switch.

Q. Don't you remember stating a moment ago that a part of your purpose was to bunch the slack in the train?

A. I said I did bunch the slack.

Q. Didn't you say that it was part of your purpose to bunch the slack?

A. I said a while ago, you asked me my reasons for applying the emergency and I told you to protect the switch, to prevent it from running on to the main line and in applying the emergency I bunched the slack and stopped the train.

Q. Didn't you say and isn't it true, that you applied that emergency to bunch the slack and that was part of your object?

(Obj. by Atty's for Def't. Obj. overruled; to which Def't excepts.)

A. That is part of it.

Q. Isn't it true that you applied that emergency in part to keep the train from blocking the crossing?

A. If the train had blocked the crossing it would have been out of the clear of the main line.

Q. Answer my question.

110 A. I answered it.

Q. Didn't you apply that emergency in part to prevent that train from blocking the crossing?

(Obj. by Att'ys for Def't. Obj. overruled; to which Def't excepts.)

A. I stated a while ago if I had blocked the crossing I would have fouled the main line, so I angle cocked this train to keep it from fouling the main line, so I evidently would have to get on the crossing or went out on the main.

(Att'y for Pl'ff insists upon a full answer to the question, and not an argumentative answer.)

The Court: "If the question can be answered "Yes or No," answer it in that way."

A. Yes.

Q. I will get you to tell how far, how many crossings are there there?

A. Three crossings, two freight crossings and a passenger crossing.

Q. When the train headed in where did you go?

A. I rode the rear end of the train up to the switch.

Q. Then what did you do?

A. I got off and threw the switch for the main line.

Q. Was that before or after your train had headed in?

111 A. After we had headed in.

Q. Did you find any other train there?

A. Supposed to be 115, I don't remember the number.

Q. Was that a freight train?

A. Yes sir.

Q. When you pulled in at the South end of*f* the crossing what became of 115?

A. They left Cumberland City ahead of 103.

Q. And you remained there for the purpose of letting 103 pass?

A. Yes sir.

Q. Where did the caboose stop when you headed in there?

A. Somewhere North of the first crossing.

Q. How far?

A. I can't say exactly.

Q. About?

A. I wouldn't try to say because I wouldn't be positive.

Q. A hundred yards?

A. No sir, couldn't have been a hundred.

Q. Or 150?

A. No sir, couldn't have been 50.

Q. Was it 40.

A. I can't answer you and be definite about the feet at all.

Q. Would it have been fifty yards North of the first crossing?

A. It would have been out on the main line in that way.

Q. I mean fifty yards North of the South crossing, you

112 say that the South end of your caboose is not as much as fifty yards North of the South crossing?

A. No sir.

Q. How wide is that crossing?

A. I suppose about fifteen feet, a common wagon crossing.

Q. How far do you have to go North or South of that crossing before your train is in the clear?

A. Just off the crossing to clear the crossing.

Q. North or South?

A. It would be North of the crossing.

Q. How much do you call the clear, how much between the rails?

A. So one car would clear another.

Q. How many feet?
A. I can't say, I never measured it.
Q. 6 ft. or 10 ft., what would you guess?
A. I would not attempt to guess at it.
Q. You have some judgment, is it as much as 10 ft.?
A. No, not as much as 10 ft.
Q. How much, would as many as 4 ft. clear it?
A. 4 ft. would clear it, yes.
Q. Do you know whether any less than 4 would clear it?
A. I wouldn't say.
113 Q. How far from the South crossing to the switch point?
A. Not having measured it I wouldn't be accurate, I might make a guess, I should say somewhere between 60 and 120 ft.
Q. From the South side of that crossing to the switch point?
A. Somewhere in that neighborhood.
Q. Now you say that crossing is just at the clear?
A. Yes sir.
Q. How far were you from that South crossing?
A. Myself personally?
Q. Yes sir, at the time you applied this emergency brake?
A. I can't say, for I don't remember exactly how we stopped.
Q. But you stopped it at once when you put it into emergency?
A. Yes sir.
Q. The train stopped still right where you applied the emergency?
A. As well as I remember, I think we finally backed up and cut the crossing after the emergency had been applied but I would not be positive about that.
Q. You don't know what they were doing at the head end, nor what signals were given at the head end?
A. No sir.
Q. Do you know where the conductor was?
A. No sir.
Q. Do you know where the head brakeman was?
A. No sir.
114 Q. When your train stopped there where did you go?
A. Explain please.
Q. Where did you first go when your train stopped on the siding?
A. I started up to the second crossing to cut it.
Q. How far did you go North of the first crossing before you applied that emergency?
A. I can't say, I remember that I was somewhere between the two crossings.
Q. Where were you when that train started backing?
A. Between the two crossings.
Q. How far from the South crossing?
A. I cannot answer it correctly at all, I was between the two crossings, that is the best answer I can give.
Q. What was the distance between the two crossings?
A. I should judge it to be somewhere between 400 and 500 ft., maybe 600 ft., that is just supposition.

Q. To the best of your judgment were you half way betweeen them at the time?
A. I won't be positive, it has been four years ago.
Q. As much as a third of the distance do you think?
A. Might have been.
Q. You think it probably as much as a third?
A. Might have been, and might not have, I won't say.
Q. How far had the train backed South before you applied the emergency?
115 A. As much as a half or three fourths of a car length.
Q. To refresh your recollection didn't it back as much as a car and a half?
A. Well I know it was backing up, I know I had to run to get to the rear end.
Q. You were up between the crossings and your caboose was just in the clear down at the South crossing, and you ran to get to the rear end?
A. Yes sir.
Q. And when you got there this train was going at what speed you say?
A. I can't say.
Q. Slow wasn't it, and the time that you stopped it with the angle cock it had not got to that crossing had it, it didn't block the South crossing?
A. I can't say positively whether it did or not, we were about the crossing, I can't say positively, I had nothing to impress it upon me at the time, and it is an occurrence that happens every day.
Q. You mean that the rear brakesman applies emergency like that every day?
Q. They do frequently.
Q. Do you mean to tell the jury that this is a daily occurrence?
A. Where it is necessary.
Q. Do you mean to tell the jury that it is necessary every day to apply the emergency?
A. There is never a day goes by that the emergency ap-
116 plication is not used.
Q. On every train on the road?
A. There is never a day goes by that the emergency application is not applied.
Q. On every train?
A. There is never a day that it is not applied.
Q. You mean that it is applied on some train every day?
A. Yes sir.
Q. Do you know how many trains on the road?
A. No sir.
Q. You say that there was nothing to impress that on your mind what occurred there?
A. No sir.
Q. It is just an ordinary occurrence?
A. No sir.
Q. Didn't Stewart tell you on that day that you hurt him?

(Objection sustained.)

Att'y for Pl'ff makes the following avowal:—"We expect the witness to answer "He did"."

Q. If Stewart had told you on that occasion that you had hurt him, wouldn't that have impressed it on you as to what was done there?

(Objection sustained.)

117 Att'y for Pl'ff makes the following avowal:—We expect the witness to answer, "It would."

Q. Now you had that switch thrown for the main track?

A. Yes sir.

Q. 103 came while that switch was thrown for the main track?

A. Now I won't be positive about that, whether we backed up and sawed by for 103 I don't remember about that, the best I can say is I don't remember.

Q. The movement immediately preceding your lining that switch up for the main track, was after 115 had gone South?

A. Yes sir.

Q. That is straight track isn't it?

A. The main line is, yes sir.

Q. The side tracks are curved aren't they?

A. Oh, yes, as you enter them.

Q. They have to curve to get off the main?

A. Yes sir.

Q. Did you back your train out on to the main line at the South before 103 passed you?

A. If we backed out I don't remember anything about it.

Q. But after 103 passed you do remember backing out and leaving some cars on the side track and coming on North?

A. Bound to have done that.

118 Cross-examination by Jno. B. Rodes, of counsel for Def't:)

Q. Mr. Hill did you hear anything about anybody having been hurt there on that train until you got to Clarksville?

A. No sir, Clarksville is the first I knew of it.

Q. How far is that from Cumberland City?

A. 21 miles I believe.

Q. You were coming North I believe?

A. Yes sir.

Q. Now this is a rough diagram on the blackboard before you and the South end is near you, and the North end is toward me. When you first got there did you head in on that side track?

A. On what is known as the South switch, this end right here.

Q. When you got on it, did the side track hold your train?

A. As well as I remember, I won't be positive about this, but I think they pulled out just far enough at the other end to foul the main, 115 was standing on the main.

Q. When you say that you mean that the head car on the North end of the side track was a little out of clear?

A. That was just hear say on my part, I didn't see it.
Q. You can not see up at the North end?
A. No sir on account of this train standing there.
Q. And the North end couldn't see to where you were?
A. Not until after this train left.

Q. When you had pulled in and got on the side track,
119 where was the caboose?

A. Somewhere North of this crossing right here.
Q. I believe you said there were three crossings?
A. Yes sir.
Q. The first was down here at the South switch?
A. Just in the clear, what you mean by that is that a car on the siding and the car on the main won't touch.
Q. You have then got to run your train in on the side track, so as the caboose would just about go over that crossing, to get in the clear?
A. I think it has to get about over the crossing to be in good clear.
Q. In other words when your caboose was on the South side of the first crossing it would hang over so far that the train might hit it?
A. That is my impression of it, yes sir.
Q. When you ran in there, you ran in so far as to be over the first crossing with your caboose?
A. Yes sir, bound to have been over it.
Q. You gave Mr. Procter your judgment of how far from the point of the switch was the first crossing?
A. I gave him my best judgment possibly from 60 to 120 ft.
Q. What did you call the point?
A. At the switch stand where the lever works back and forth.
Q. Is there a switch stand that has to be operated to throw the switch?

120 A. Yes sir it stands four or five feet from the side of the track.

Q. How do you throw it?
A. Has to be unlocked, the lock taken off, the hasp raised and brought half way around.
Q. What have you got to unlock it with?
A. With a switch key. (Witness exhibits key.)
Q. Now the switch stand, which side of the track is it on going North?
A. On the right hand side going North.
Q. And right at the point of the switch?
A. Yes sir.
Q. What is the frog of the switch?
A. It is right there where the side track rail crosses the main line rail.
Q. How far is that frog from the point of the switch?
A. I couldn't say accurately.
Q. Give your judgment?
A. Between fifteen and twenty feet maybe, I won't be accurate on that.

Q. When your train came in you ran up until your caboose was just across that first public road there. Is that right?
A. Yes sir we cleared the road just a fraction.
Q. Where did you then go?
A. I started between this first crossing and the second
121. crossing up there. I started up to the second crossing to either watch it, or if anybody showed up there to cut it.
Q. When the train ran in did you do anything with the switch?
A. I threw it, lined it up for the main.
Q. You closed it?
A. Yes sir.
Q. How?
A. Closed it and locked it.
Q. Then what did you do?
A. Walked on up to this other crossing.
Q. Then what did you do?
A. Walked up to the second crossing.
Q. What for?
A. To protect the crossing, and to keep the cars from blocking it over a certain length of time, five minutes.
Q. What were you going to do there?
A. Cut the crossing if anybody showed up.
Q. In other words separate the train so as to leave a passage way?
A. Yes sir, cutting the cars.
Q. And you went up there?
A. That is where I started.
Q. You said the train started to back as you were going up there?
A. Yes sir.
Q. How far did it go before you applied the air valve in
122 the rear and stopped it?
A. I can't answer definitely, I don't remember.
Q. About how far?
A. It might have been half a car, and it might have been three fourths, I can't answer definitely.
Q. What was its position with reference to being in or out of the clear when you applied the air valve and stopped it?
A. That is another question I can't be positive about, but my judgment is, it was right about the first crossing.
Q. If it was right at or about the first crossing it was just in the clear, or possibly just out of the clear?
A. It might have been either one, I won't be positive about that. It was bound to have been right at the clear anyhow.
Q. And then it was you say you applied the air valve and stopped the train?
A. Yes sir.
Q. Now the train in backing up apast that switch, is there any rule as to whether or not that train should stop or not before it passed that switch?
A. If he wanted to back up there, it is duty to know——
Q. I am just asking you whether there is a Rule or not. I will show you a Book of Rules and ask you whether or not that was in force at that time by the L. & N. Railroad Company?

A. Yes sir, that is the Book of Rules.

123 Rule on Page 29, 117 (*a*) read in evidence by Att'y for Def't, which is as follows:— "117 (*a*). A train about to enter or leave a siding must come to a full stop before the switch is thrown, and no signal must be given to start the train until the switch is turned and the lock is secured through the hasp.

No attempt should be made to cloes a switch until the last wheels are off the switch rails. The person who locks a switch must grasp the chain and pull the lock to see that it is securely fastened, and after, having done so, must look twice at the switch rails to see that they are in their proper position. At meeting or passing points the employe attending the switch will, after locking it to main track, take a position not nearer than ten feet from the switch until the expected train has passed."

Q. Is that the Rule to which you referred?
A. Yes sir.
Q. Was that Rule in effect in September 1908?
A. Yes sir.
Q. Was that train stopped by anybody but you in moving towards that switch?
A. No sir, I stopped that train.
Q. Did you do anything before you stopped that train?
A. I gave stop signals.
Q. Where were you when you gave them?
124 A. Standing in the middle of the main line.
Q. What sort of signals did you give?
A. Stop signal, in other words anything waved across the line is considered a stop signal.
Q. The regular stop signal known to railroad men?
A. Yes sir.
Q. Was that signal observed or obeyed by the engineer?
A. No sir.
Q. What did the train do, continue to back?
A. Yes sir.
Q. And your signal remained unobserved?
A. Yes sir.
Q. Did your engineer see them?
A. I can't say whether he did or not.
Q. What kind of space is that, a platform or anything?
A. The depot is at the North end.
Q. Do you know whether there were any people there or not?
A. I presume there was, Cumberland City like all other little towns, near the passenger time they all flock to the train.
Q. You do know that he continued to back after you gave him the stop signal?
A. Yes sir, kept backing up.
Q. Then when the train first got out of the clear, or just in the clear, at on near the first crossing, you applied the air and stopped him, why did you do it?

A. To keep him in the clear and to keep out of the switch
125 point before I could get to it.

Q. Could you have thrown that switch before you- train stopped?

A. It would have been a chance in me throwing it is all.

Q. Is there any Rule governing whether you shall throw that switch until the train stops?

A. The Rule says that the switch must be thrown when he starts back.

Q. Is there any Rule governing why?

A. He must know the switch is thrown before he starts backing up.

Rule 117 (*a*) read in evidence by Att'y for Def't as follows:—

"A train about to enter or leave a siding must come to a full stop before the switch is thrown, and no signal must be given to start the train until the switch is turned and the lock is secured through the hasp."

Q. Now why did you stop that train?

A. To keep it in the clear, to keep it out of that switch at the same time.

Q. Just explain to the jury what would have resulted, your signal being unobserved or unobeyed, and the train continuing to back up, what would have resulted if you had not stopped that
126 train?

A. He would have backed through the switch points and ruined them and caused the Company to pay the cost of about $15.00 a point and probably the switch stand.

Q. State whether or not there was a possibility of derailing the train?

A. Yes sir very likely, I have often thought about it.

Q. Would there have been any property damaged if that train had continued to go back and cross that switch?

A. Yes sir the goose neck bent and the switch stand.

Q. And perhaps the caboose derailed?

A. Yes sir.

Q. Now on freight trains they have what is called the air brake?

A. Yes sir.

Q. And they had it on that train?

A. Yes sir.

Q. That air brake, is it not in the engine and in the caboose too?

A. The engineer has what is called the air brake valve in his engine.

Q. And it can be operated also in the caboose and on the rear of that?

A. Yes sir, they have what is called the conductor's valve on the inside of the caboose, and use what is called the angle cock on the rear end.

127 Q. What is that?

A. It is to automatically close the air at the end of each car. It is just the same as on the end of any box car.

Q. How do you use it?
A. Just by turning it.
Q. Is that the way you used it on that occasion?
A. Yes sir.
Q. Are there not usual, ordinary, customary jerks and jars, incidental and necessary in the operation of freight trains on railroads?
A. Every day.
Q. Can they be operated without them?
A. I don't see how they are going to do it.
Q. Is there any slack between the cars?
A. All the way, about a foot or a foot and a half of slack.
Q. In a train of 30 cars, about how much slack?
A. I suppose between 35 and 40 ft. of slack.
Q. In stopping trains, does that slack take up?
A. Yes sir.
Q. When you stopped it on that occasion was there any jerking and jarring?
A. There was none at the rear end; I don't know whether there was at the front end or not.
Q. Could there have been?
128 A. Might have been some slight jar.
Q. In your judgment would there have been any more than the usual and ordinary jerking and jarring of the train incidental to its ordinary operation?
A. I can't say how much there could have been.
Q. How long have you been a railroad man?
A. Between six and seven years.
Q. Now the air is more frequently applied by the engineer and from the engine than anywhere else?
A. Oh, yes.
Q. And when the engineer applies the air brake or the emergency brake state whether or not it is not felt more strongly in the rear than it would be in the engine?
A. It is a chance that way, but if we are sitting down we are always braced and watching for it.
Q. And such jerks and jars are usual and customary in the ordinary operation of trains on railroads?
A. Every day, every day.
Q. When you stopped that train on that occasion as you say to avoid injury to property you have mentioned it did take up the slack of the train?
A. Yes sir, it was bound to.
Q. In stopping and taking up the slack you prevented that damage you referred to?
A. I prevented him going out on the main and splitting the switch.
129 Q. And that also kept the train in or about the clear?
A. In or about the clear I won't be positive.
Q. Could you have hurried forward without stopping it and thrown that switch?

A. I might have and again I might not, it is a risk we take and so make ourselves liable for suspension.

Q. If you had failed to throw it what would have been the result?

A. I would have been liable for suspension; possibly from 15 to 25 days for being negligent.

Q. And the property would have been damaged?

A. Yes sir.

Q. At that time you believed that that was the wisest and safest way to prevent that property damage that you say was impending?

A. That was the only safe way that I saw, and I used it according to my best judgment.

Q. Is that why you did use it?

A. That was my best judgment.

Q. Did I understand you to say that the use of that air in the caboose, either in the caboose or on the rear of the caboose is a matter of frequent occurrence in railroading?

A. Yes sir, very frequent.

Q. In what different capacities have you worked in the
130 last six or seven years?

A. I started in as fireman first on the South end, and on account of ill health I quit and went to braking and then was promoted as conductor.

Q. Have you been running continuously?

A. With the exception of one or two months in the middle of the summer in dull business I am back to braking.

(Redircet examination by B. F. Procter, att'y for pl'ff:)

Q. When 103 passed you, your train was standing on the switch?

A. It was on the siding.

Q. It was standing still when 103 passed?

A. Yes sir, bound to have been standing still then.

Q. You don't know who gave the signal for your train to back?

A. No sir, do not.

Q. When your train passed on to the siding or headed into the siding, the switch was thrown by you at the South end?

A. Yes sir.

Q. You lined up for 115 to pass by?

A. Yes sir.

Q. Are you certain that there was any train there?

A. Yes sir.

Q. And you are certain that that train had gone South before 103 came?

131 A. Yes sir.

Q. You tell the jury that you might have gone ahead of your train and thrown that switch, but it would be taking chances on it, you might have failed?

A. Yes sir, I might have failed, any obstacle might have prevented my key from unlocking it. I have been over a minute and a half, three minutes, yes five minutes unlocking them.

Q. But you had just locked this one hadn't you, you had just unlocked and locked that switch?

A. Yes sir.

Q. You knew whether it was in good condition or not?

A. I started to answer that question, I have seen this switch in one minute after you unlocked it and took your key out, there is a little tongue in there that will fail to get in position very frequently, and you have to take it and knock it on the side to get it in place.

Q. If you had gone back and found the lock in that position what is the reason you could not have applied your emergency then?

A. Because he would have been so close on me I couldn't have had time.

Q. Did you attempt to go down and close that switch?

A. From where I was I didn't consider that I had time.

Q. You made no attempt to do it?

A. I left where I was and come to the South end, to the rear end.

132 Q. How fast was it going faster than you could run?

A. No sir.

Q. About how far had you gone, could you form an estimate?

A. I don't know.

Q. Was it going as fast as a man could walk?

A. I couldn't say about that.

Q. So you took no risk you knew that the emergency was very dangerous to the men on the train?

A. No sir.

Q. Isn't that the Rule that you shouldn't use it only for the purpose to protect life or property?

A. Yes sir.

Q. Isn't it made for the protection of the lives of the men on the train and the property in the train?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. I don't read it that way. The Rule says to protect life or property and I applied it to protect property, not life.

Q. You are forbidden to apply the emergency brake except to protect property in the train or off the train—why is it made hazardous?

A. I consider it to mean life or property, and if I see any danger to this train approaching any obstacle that I see on the track
133 that I should think would derail my train, I should apply the air and stop it.

Q. You knew it was dangerous to the men on the train, and liable to break drawheads if you put that train into emergency?

(Objection sustained.)

Q. Isn't that true that it is dangerous to the men on the train and liable to break out drawheads and damage property on the train to put it into emergency?

(Obj. by Att'ys for Def't. Obj. overruled; to which Def't excepts.)

A. No I don't consider it so much so as to endanger life.

Q. Then why is it that you are forbidden to apply that emergency stop except to protect life or property?

A. Now these Rules are made and we work by them and very frequently take that book of rules and leave Bowling Green to go to Paris and work from here to Paris just by that and you would get to Paris next year sometime; there are some things in this book that we don't follow always and some we do follow.

(Obj. by Att'ys for Def't. Obj. overruled; to which Def't excepts.)

134 Q. You said something about going up there to cut the crossing?

A. Yes sir.

Q. Could you cut it until 103 passed?

A. I could have done it if I had room at the other end.

Q. But you didn't have room?

A. I didn't know it when I started up there.

Q. Wasn't that a straight track?

A. Yes.

Q. And didn't you know that you couldn't cut that crossing when you had to saw by 103?

A. I didn't know that.

Q. Don't you have to have signals to cut the crossing?

A. Yes sir.

Q. Don't you know if you take sidings temporarily that you don't cut the crossings?

A. If we are going to be there just a few minutes we watch the crossings, and if a man shows up we cut it.

Q. If he demands it?

A. Yes sir.

Q. And then in case of emergency you have a right to block it as long as necessary?

A. Yes sir.

Q. Then you cut it if you have occupied it longer than five minutes?

A. Yes sir.

135 (Recross-examination by Jno. B. Rodes, Att'y for Def't:)

Q. You had to wait here for 103?

A. Yes sir.

Q. And that necessitated the cutting of these crossings?

A. Yes sir.

Q. There are provisions there for that?

A. Yes sir we have to protect them.

Q. You spoke of the head end out here being out of clear as you are informed that could be true without any part of your train being off the siding at all?

A. Yes sir it could be out of the clear and still be on the siding.

Q. The whole train may be on the siding and yet be a little out of the clear and can be swiped?

A. Yes sir.

Q. And you knew nothing about this up here?

A. No sir.

Q. And you state that this book of Rules applied at the time of the occurrence which you have stated about, now I will ask you if these rules did not govern which I read. Rules 117, and 117 (*a*), which I will now read:

(Obj. to the reading of said rules by Att'y for Plaintiff, which is overruled, and to which plaintiff excepts.)

"117. Conductors will be held responsible for the proper adjustment of the switches used by them and their trainmen;
136 except where switch-tenders are stationed.

Whoever opens a switch shall remain at it until it is closed, unless relieved by some other competent employe.

When there is more than one train to use a switch, it must not be left open unless one of the trainmen of the following train is at the switch and takes charge of it.

117 (*a*). A train about to enter or leave a siding must come to a full stop before the switch is thrown, and no signal must be given to start the train until the switch is turned and the lock is secured through the hasp.

No attempt should be made to close a switch until the last wheels are off the switch rails. The person who locks a switch must grasp the chain and pull the lock to see that it is securely fastened, and, after having done so, must look twice at the switch rails to see that they are in their proper position. At meeting or passing points the employe attending the switch will, after locking it to main track, take a position not nearer than ten feet from the switch until the expected train has passed."

Q. Were these Rules in effect at that time?

A. Yes sir.

137 *Testimony of Dr. A. T. McCormack.*

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. How long have you practiced medicine?

A. Since the 12th of June 1896.

Q. You are a graduate of what school?

A. Medical Department Columbia University, New York City.

Q. From what other schools have you taken degrees?

A. Ogden College here and Bethel College, Russellville.

Q. Have you taken courses in other medical schools?

A. Yes sir, post-graduate in New York, Philadelphia, Chicago, and Rochester, Minnesota.

Q. Have you had any experience in surgery in any hospitals?

A. Yes sir at Bellevue, New York, and general surgeon at Paterson, N. J.

Q. Are you connected with a Hospital in the City of Bowling Green?

A. Yes sir, surgeon of St. Joseph's Hospital.

Q. What other experience have you had in the practice of medicine and surgery?

A. I have had considerable surgical practice.

Q. Did you assist in an autopsy on W. H. Stewart?

138 A. Yes sir.

Q. When was that?

A. I don't remember the date exactly, about four years ago.

Q. Who assisted in that?

A. Dr. Reardon, Dr. T. W. Stone, Dr. Huddle, and Dr. Meredith if I remember correctly.

Q. I will get you to tell the jury if you reduced to writing the result, and if so what you found?

A. It is always reduced to writing where it is held by more than one doctor. This is in Dr. Reardon's handwriting.

Q. What was the result of that autopsy?

A. If I remember correctly on the left side of his neck and shoulder there was a black blue place that showed it had been there for several days. The skull cap was removed and this whole section of the top of the head lifted off and the left side of the brain was adhered to the skull, when we opened the dura mater there are three layers of skin over the brain and when the outer layer was opened there was a large amount of floating serum that is not normally present in that position and it was adherent to the brain at two or three points, and the inner skin, peri mater, was thickened and congested and bloody and adherent to the brain tissues all along and in sections and both of the ventricles

139 or spaces in the brain were filled with clotted blood and the rest of the brain was perfectly normal, and our conclusion from that, I think probably Dr. Stone treated the case and gave the symptoms previous, and from the examination of the brain and the symptoms described by Dr. Stone we concluded that his death resulted from the injury to the side of his head or from a blow.

Q. Say that he struck his head against the side of his engine and he received this injury on September 5th and that afterwards he suffered from that injury from September 5 until you saw him at that time and he died on Sept. 27th, with his brain in the condition that you found it in and at the time that he received this injury he was in good health, what would you say was the cause of his death?

(Obj. by Att'ys for Def't. Obj. overruled; to which Def't excepts.)

A. It was unquestionably from the blow on his head.

Q. Could you tell that from the examination of the brain?

A. Yes sir, it could not be from anything else, if he had had meningitis it would have involved the entire brain or a disease that would produce anywhere in the neighborhood of his condition could only be caused by atronotism of some sort.

140 Q. What do you mean by atronotism?

A. A blow, an injury, a lick, or anything.

Q. You tell the jury that his death was caused by an injury to his head?
A. Yes sir, his death was caused by that.

(Obj. by Att'ys for Def't. Obj. overruled; to which Def't excepts.)

(Cross-examination by J. C. Sims, Att'y for Def't:)

Q. You had not been treating him?
A. No sir, I went to school with him but I never treated him.
Q. You never saw him until after his death?
A. No sir, I saw him at the undertaking establishment.
Q. And you say the only thing you saw was on the shoulder?
A. Yes sir the only thing outside, was on the shoulder.
Q. That was the only outward indication you saw?
A. Yes sir.
Q. You don't remember the date of the post mortem examination?
A. I can tell from this—September 28th 1908.

(Redirect examination by B. F. Procter, Att'y for Pl'ff:)

141 Q. You say you went to school with him?
A. Yes sir.
Q. Tell the jury what kind of a man he was?

(Obj. by Att'ys for Def't. Obj. overruled; to which Def't excepts.)

A. You mean as to his habits?
Q. Yes.
A. I knew him well and he was a thoroughly decent fellow, and was perfectly healthy, he was built kind of a slim Jim like Mr. Rodes there, but he was always healthy, and as to his habits, his habits were good.

(Recross-examination by J. C. Sims, Att'y for Def't:)

Q. You say you went to school with him, you didn't go after he went to railroading did you?
A. No sir, I had treated his sister and other members of the family though, and knew him well.

Testimony of Dr. T. W. Stone.

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. Where do you live?
142 A. Bowling Green.
Q. What is your occupation?
A. Practicing physician and surgeon.
Q. You are a graduate of what school?
A. Vanderbilt Medical School.
Q. When did you graduate from Vanderbilt?

A. In 1893.
Q. What has been your occupation since?
A. Been practicing all the time since.
Q. How long have you lived in Bowling Green?
A. About sixteen years.
Q. How long did you know W. H. Stewart?
A. Possibly ten years.
Q. Were you his family physician?
A. I was.
Q. Were you called to see him any time about September 1908, if so, tell the jury what services you gave him and what treatment you gave him?
A. He came to my office in September, the 6th I think it was, 1908, complaining with his head and his shoulder and with a severe headache and soreness in his shoulder and head, and I prescribed for him then, and didn't see him any more for several days, and he came back to my office again still complaining the same way and the pain was possibly worse, still he had been at work since——

143 (Obj. by Att'ys for Def't. Obj. overruled; to which Def't excepts.)

And I saw him no more until on the 23d I believe it was, and he then came into my office, and I found him with a temperature of 101 and he had Aphasia I thought, I forget the type of it, and he couldn't say what he wanted to say, tried to talk, and I told him to go home and go to bed, and I would call to see him, and his wife that evening called me and told me——

(Objection sustained).

She called me to see him then, I guess she had a reason for it, and when I got there I found that he was beginning to be paralyzed further than his tongue, and I prescribed for him again, and he still carried a temperature, and at night she phoned me again and he was completely paralyzed on his right side and he proceeded as a paralyzed man until his death, and carried a temperature during the whole time, and I think he died on the 27th of September.
Q. Did you insist in holding an autopsy?
A. I did.
Q. Tell the jury what you found his condition when the autopsy was held?
A. We found no trouble with any of his organs, the thoracic organs, lungs, heart, and bowels, were all right, but there was an old bruise on his shoulder which had gotten to a yellowish state at that time, and when we opened the head we found that the cover-

144 ing of the brain had been adhered to the brain substance, and if I remember right I think in the ventricle on that side there was some serum.
Q. Which side was it?
A. On the left.
Q. Where was the bruised shoulder?
A. On the left side.

Q. If paralysis ensued from that, which side was paralyzed?
A. It is owing to the position in the brain, but it is most often on the opposite side from the side of the head that is hurt.
Q. From the indication of his brain and the examination that you made there, tell the jury what caused his death?
A. He died from the injury.
Q. What injury?

(Obj. by Att'ys for Def't. Obj. overruled, to which Def't excepts.)

A. The injury to his head.
Q. What did he tell you about how he received that injury?

(Obj. by Att'ys for Def't. Obj. overruled; to which Def't
145 excepts.)

A. He told me on his first visit that he was down the road and stated the place.
Q. Just tell if he received any blow, tell what he said?
A. He said that he was thrown against the cab while at work in his engine.

(Obj. by Att'ys for Def't. Obj. overruled; to which Def't excepts.)

Q. Do you know how many days he was paralyzed before death ensued?
A. It was from the 23d to the 27th, that was five days, say into the fifth day.

(Cross-examination by Jno. B. Rodes, Att'y for Def't:)

Q. When was the last time he was at your office?
A. The 23d.
Q. Where was your office?
A. At my residence on College Street.
Q. How far from where Mr. Stewart lived?
A. He lived on Clay Street.
Q. How far is that?
A. About six blocks.
Q. Do you know how he came to your office?
146 A. I do not, it seems to me that he rode in a grocery wagon, I wouldn't say for sure.
Q. When was he there before that?
A. My books show on the 6th and my recollection is that he was there one time between the 23d and 6th.
Q. Do you recollect the second time?
A. I do not know the date of it sir.
Q. So you only saw him three times from the 6th until the 23d of September?
A. Yes sir.
Q. And each time at your office?
A. Yes sir until the evening of the 23d I went to his residence.
Q. Doctor, the only external signs of injury was on the left shoulder at the autopsy?

A. No sir, the left shoulder was bruised, but the brain showed——
Q. I say external?
A. Yes sir, externally that was all I could see.
Q. Had you seen him before the 5th of September?
A. Often.
Q. Did you visit him while he was sick in the spring of 1908?
A. He had a spell of appendicitis and I don't recollect the
147 date.
Q. When was that?
A. I do not know, I could go to my book and tell you.
Q. Was it the same year?
A. I can't tell you.
Q. Do you recollect whether or not he had an attack of Lagrippe in the spring of 1908 and in bed about three weeks?
A. I didn't wait on him in an attack like that, I might maybe have visited him, if I had my books I could tell you.
Q. And you also visited him for an attack of appendicitis?
A. I did.
Q. Can you give the date?
A. No sir.
Q. How long was he confined with that?
A. To [illegible] bed possibly two weeks.
Q. I am going to ask you to get the date of that, bring your books?
A. Go now and get it?
Q. When you get through. Who was present at the autopsy?
A. Dr. Fred Reardon, Dr. McCormack, Dr. Meredith and myself.
Q. They are all physicians here?
A. They are.
Q. Do you know the railroad physicians here?
148 A. I do.
Q. None of them were present?
A. None of them. When we made the autopsy we were not thinking of this, we were aiming to get it before an Insurance Company in which he had a policy.
Q. In which he had a $5,000 policy for insurance?
A. I don't know about the insurance, but that is what they called for it for.
Q. He did have insurance?
A. Yes sir, but I don't know how much.
Q. Do you know whether that insurance was collected or not?
A. I heard it was is all.
Q. Do you know the amount?
A. No sir, do not.
Q. Were you informed of the amount?
A. Might have been told of it at the time but I don't recollect it.
Q. Isn't it your best recollection that it was $5,000?
A. I don't know sir.
Q. Will you bring your book over here with that portion of Mr. Stewart's account referred to heretofore?
A. Yes sir, I will bring it.

(Redirect examnination by B. F. Procter, Att'y for Pl'ff:)

Q. What was the condition of his health immediately pre-
149 ceding this injury?

A. Preceding it, it was good.

Q. Tell the jury whether or not he had entirely recovered from the illness in the spring?

A. He had. He had no trouble from his appendicitis, and the illness that the other side spoke of there was nothing left of that.

(Recross-examination by Jno. B. Rodes, Att'y for Def't:)

Q. When was the last time that you had seen him prior to September 5th?

A. I can't tell you sir, I saw him often, we were close friends and he came to my office when he didn't need medical attention, and if I was at the depot and saw him I always went to him. I did his practice.

Q. When was the last time you made an examination of him before September 5th?

A. It seems that it was when he had appendicitis.

(Redirect examination by B. F. Procter, Att'y for Pl'ff:)

Q. Isn't it true that he often came to you to talk about his little afflicted daughter?

(Objection overruled; to which Def't excepts.)

150 A. Yes sir, he had an afflicted little daughter and he often came to talk to me about her.

(Dr. Stone produces dates above referred to, and his examination is continued.)

(Recross-examination by Jno B. Rodes, Att'y for Def't:)

Q. Did you find the date when you treated Mr. Stewart for appendicitis?

A. Yes sir, in March of the same year, 1908.

Q. How many visits?

A. My first visit was on the 1st and my last visit on the 26th is what the books show.

Q. Isn't it a fact that physicians know very little about the human brain?

A. No sir, that is not true at all.

Q. And its operations and functions?

A. No sir.

Q. Do you know anything about how it operates?

A. Yes sir.

Q. Isn't it a fact that they know as little about the brain as any part of the human body?

A. I expect as to its operation it may be possibly true, anatomists forget it quicker than anyone else.

151 Q. Isn't it true that they know very little about it?

A. No it is not true.

Q. Isn't it a fact that they know very little about the nervous system and the condition of the brain?
A. It is not. They understand it.
Q. How does a man think?
A. I am not here to give you a lecture and that has nothing to do with this case.
Q. Do you know, doctor?
(Witness does not answer.)

(Dedirect examination by Mr. Proctor, Att'y for Pl'ff:)

Q. How many visits did you make in the spring of 1908?
A. The books show from the 1st to the 27th when he had appendicitis.
Q. Do you know how many visits you made there from the 1st to the 27th?
A. I would say about 25 visits, possibly, I didn't go every day towards the last of the sickness.

(Recross-examination by Jno. B. Rodes, Att'y for Def't:)

Q. What is the name of the outer covering of the brain?
A. Dura mater.
152 Q. Is that next to the skull?
A. It is not only in some places.
Q. What is the name of the inner covering?
(Obj. by Att'y for Pl'ff. Obj. overruled; to which Pl'ff excepts.)
A. Peri mater.
Q. What is the name of the lobe of the brain on the right side of the head right up here?
A. I can not tell you sir.
Q. What is the name of the lobe on the left side?
A. The same thing except on different sides of the brain, I can't tell you the name just now.
Q. The brain is composed of convolutions, one folding into the other?
A. Yes sir.
Q. What are the functions of each one of them?
A. I can not tell you.
Q. Do physicians know the functions of each one of them?
A. They do.
Q. Do you know?
A. I haven't studied up on it recently and I can not tell you sir, they are located in different places and have different motions.

153 *Testimony of T. R. Neill.*

(Direct examination by B. F. Proctor, Att'y for Pl'ff:)

Q. Where do you live?
A. Bowling Green, Adams Street, 1011.
Q. How long have you lived here?

A. I have been in Bowling Green about thirty-five years I reckon
Q. How much of that time have you used in railroading?
A. About 28 years.
Q. In what capacity?
A. Braking and conductor?
Q. What character of trains did you brake on?
A. Freight train.
Q. How long?
A. About three years, two or three years I believe.
Q. How long did you act as conductor?
A. Well about twenty-five years I guess in all.
Q. And on what character of trains?
A. Freight and passenger.
Q. When did you quit railroading?
A. I think it was about six or seven years ago.
Q. On what division did you run?
A. Memphis Branch, between Bowling Green and Paris on freight, and between Bowling Green and Memphis on passenger.

154 Q. Are you familiar with the construction of the side track and buildings at Cumberland City?

A. Well, I was at the time, I don't know how it is now. At the time I was on the road I knew all the sidings.

Q. The operation of the trains at all sidetracks by signals and brakes are the same, in all side tracks and in all trains?

A. Yes sir, the same signals and rules.

Q. Are you familiar with the signals and rules for the operation of freight trains and the air brakes and signals in 1908?

A. Yes sir, I reckon I was, in 1908 I was not on the road then.

Q. Didn't the same rules as to air and transportation that were in effect when you left the road as there were in effect September 1908?

A. I think so, yes sir.

Q. The rules for the transportation department that were in effect when you left the road was the same as in 1908, isn't this the book of rules that went into effect in 1903, is that the book that was in effect then?

A. Yes sir.

Q. Now I show you a book of rules revised January 6, 1908 and will get you to examine and see if these rules for the use of the emergency were in effect in 1903, if that rule was in effect

155 at that time, on page 18, was that in effect at the time you last served?

A. I think this is the same rule as when I was on the road, I think that is the same in regard to the use of the air.

Q. Is or not the signals that were in effect for the operation of the trains and the same rules were in effect—you have stated that though.

(Obj. as to competency of said witness, by Att'y for Def't.)

(Examined by J. C. Sims, Att'y for Def't as to the voire dire:)

Q. You are in the coal business now?

A. Yes sir.
Q. How long have you been in the coal business?
A. Five or six years.
Q. How long since you were connected with the L. & N. Railroad?
A. I went into the coal business six or seven years ago.
Q. It has been about that long since you had any connection with the L. & N.?
A. Yes sir.
Q. And since that time you have made no effort to keep up with the rules of the Railroad Company?
156 A. Why, no, I haven't.
Q. That Book is Special Rules Governing the Use of Air brakes and Whistles, is it not?
A. Yes sir.
Q. That went into effect January 1908?
A. Yes sir.
Q. You have never had occasion to examine it closely?
A. No sir, only just from what I see.
Q. And that is just simply a momentary, casual examination, that you have made on the stand this morning?
A. Yes sir.

(Obj. overruled; to which Def't excepts.)

(Redirect-examination by B. F. Procter, att'y for pl'ff:)

Q. Say that a train was standing, a freight train was occupying the siding at Cumberland City for the purpose of letting a South bound passenger train pass and it was desired to have that freight train back South for the purpose of clearing the North end of the switch, and the engineer should give three blasts of the whistle indicating that he was going to back his train, what is the duty of the flagman upon the rear of the train provided that he has the switch thrown for the main track?

157 (Obj. by Att'ys for Def't. Obj. overruled; to which Def't excepts.)

A. I didn't understand the question, what was the flagman's duty if he had the side track thrown for the train on the side track to back out, if the train is standing on the side track and the engineer whistles the back up signal, what is the duty then?
Q. Yes sir.
A. His duty is to throw the switch so they can back out, if the switch is not thrown. That is what I did when I was braking, is to throw the switch.

(Objection by Att'ys for Def't. Obj. overruled; to which Def't excepts.)

Q. You say that that is the duty of all brakemen and flagmen?

(Obj. by Att'ys for Def't. Obj. overruled; to which Def't excepts.)

Q. I understand you that that is the duty of any flagman at the rear of the train under the circumstances which I have indicated?
A. Yes sir.

158 (Obj. by Att'ys for Def't. Obj. overruled; to which Def't excepts.)

Q. What is the danger to the men on the train in applying emergency when a train is backing on the side track?
A. It could do a right smart damage I reckon, backing up and stopping it at a sudden stop like the emergency would, it is liable to knock the freight down and tear it up and I have known it to knock out draw-heads.

(Obj. by Att'ys for Def't to above answer. Obj. is overruled, to which Def't excepts.)

Q. Anything further?
A. I don't know.
Q. Any danger to the men, what is the danger to the men or property on the train?

(Objection sustained.)

Q. What other damages, if any, are liable to be done by applying the emergency?
A. Well, I don't know, it is owing to the position, I can't tell what could be the damage done, there is no way to tell until after it was done, I think it——

159 (Objection sustained.)

Q. In your experience as a railroad man tell what is the danger in applying the emergency when a train is backing?

(Objection sustained.)

Q. Now without pressing that question further, I will ask you if the engineer is backing his train in obedience to a back up signal from the front, and would it be proper railroading for the rear man, the flagman, to put that train in emergency, and under what circumstances should he put it in emergency, if at all?

(Objection sustained.)

Att'y for Pl'ff makes the following avowal: Witness will state "it would not be proper for him to apply the emergency, because he should open the switch."

Q. Isn't it true that if a brakeman under the circumstances named is within 100 or 120 ft. of the switch stand and the train is backing out slowly, that he could easily have beaten the train to the switch and thrown it after the train begins to back?

160 (Objection sustained.)
Att'y for Pl'ff makes the following avowal: We expect the witness to state that he could do so."

Q. At what distance from the switch stand could a brakeman precede an engine to the stand and throw it without stopping the train?

(Objection sustained.)

Q. Say that he was backing slowly?

(Obj. overruled; to which Def't excepts.)

A. It is owing to how swift the man went, if the train was going slow, if he went fast enough he could throw it, and if he didn't go fast enough he couldn't throw it. It would depend on the speed of both of them.

Q. What is the usual and customary thing for the flagman to do when the train is backing out at the usual rate of speed, what should the flagman do if the switch is not thrown?

(Objection sustained.)

Att'y for Pl'ff makes the following avowal: We expect the
161 witness to state, "He should go to the switch stand and throw the switch, and let the train out."

(Carlyle Tables of Mortality here introduced in evidence. And according to said tables of mortality, Kentucky Statutes, Page 1963, at the age of 34, the expectancy of years would be 31.68.)

Testimony of John Suttle.

(Direct-examination by B. F. Procter, att'y for pl'ff:)

Q. Where do you live?

A. Woodburn.

Q. What is your occupation?

A. Merchandising, selling goods.

Q. Where were you raised?

A. Mostly in Warren County, in Richmond and Woodburn, and also in Tennessee.

Q. What experience have you had as a railroad man?

A. Seven years.

Q. Between what years?

A. I commenced work I think about May 1902 and quit about April 1909.

Q. Were you in the employ of the Company in September 1908?

A. Yes sir.

162 Q. Is this the Book of Rules in effect at that time?

A. I guess it is, you can tell from the date.

Q. What capacity did you serve in?

A. As brakeman and flagman.

Q. On what character of trains?

A. Freight.

Q. Are you familiar with the rules and customs governing the running of trains in 1908 and the rules governing the transportation department?

A. I was pretty familiar when I quit the road, I don't know that I can repeat the rules now.

Q. You were familiar with the way this switching was done?

A. Yes sir.

Q. Did you run between here and Paris at any time?

A. No sir

Q. You are not familiar with the side tracks at Cumberland City?

A. No sir.

Q. Say that Cumberland City has a side track, and a North bound freight took the siding there for the purpose of letting a South bound passenger train pass going in an opposite direction, and after the South bound passenger train had passed, the switch at the South end was closed, and the siding was not sufficient to cut or clear the entire freight train, and it was necessary to back the train from the North towards the South, and the engineer had received the signal and answered that signal with three short blasts of his whistle,
163 was that the proper signal that he was going to back up?

(Objection by Att'ys for Def't for the reason that there is no question raised as to that. Obj. sustained.)

Q. Then if that signal had been given what was the duty of the flagman to the rear, in the event that he had his switch closed to the rear and the engineer had answered that signal to back slowly?

(Obj. by Att'ys for Def't. Obj. overruled; to which Def't excepts.)

And the South end was in the clear but it was necessary to back it in order to clear the North end of the siding?

A. And the engineer gave three blasts of the whistle, what is it you want to know?

Q. I want to know what is the duty of the flagman or brakeman?

A. It was his duty to open the switch and give the signal to back out.

(Obj. by Att'ys for Def't. Obj. overruled, to which Def't excepts.)

Q. You are familiar with the use of the emergency brake are you not?

164 A. Yes sir.

Q. If that train under the circumstances mentioned had begun to back slowly, and the emergency brake had been applied, what danger would there be in the application of the emergency under such circumstances, to the men on the train or the property on the train, if any?

(Obj. by Att'ys for Def't. Obj. overruled, to which Def't excepts.)

A. Well the emergency usually causes considerable jar or shaking up of the train.

(Cross-examination by Jno. B. Rodes, att'y for def't:)

Q. You are familiar with the rules are you, as in all cases where danger of damage or injury to life or property where the application of emergency is proper?

A. Where it is necessary.

Q. And under any circumstances where that occurs, then the emergency may be used?

A. If there is danger to them, yes sir.

Testimony of Capt. George James.

(Direct-examination by B. F. Procter, att'y for pl'ff:)

Q. Where do you live?

A. Bowling Green.

165 Q. How long have you resided here?

A. About thirty years.

Q. What experience have you had during that time as a railroad man?

A. About twenty-five years.

Q. In what capacity and for what railroad?

A. Brakeman, baggage man, and conductor, L. & N. Railroad.

Q. Are you familiar with the road between this point and Memphis?

A. Slightly familiar, it has been a long time since I was on the Memphis line.

Q. When did you quit the service?

A. In 1904 or 1905, I think in 1905.

Q. Are you familiar with the signals or use of the air brake say in 1908 and the proper way in which to manage and control trains under the rules and customs of the L. & N. Railroad Company?

A. I remember very distinctly the use of the air and its applications during the time I was on the road, but I was off the road before 1908.

(Obj. by Att'ys for Def't. Obj. overruled, to which Def't excepts.)

Q. Examine Rule on page 18 and see if that Rule was in effect in 1905?

166 (Witness examines Rule.)

A. Yes sir.

Q. I will show you Book in 1903, revised and reissued in 1907, was that book of rules in effect at that time?

A. If it was not revised until in 1907 it was; yes sir.

Q. Now I will get you to state Captain, taking it that a freight train has headed in on the siding at Cumberland City for the purpose of letting a South bound passenger train pass and the train is in the clear at the South end, and clear of the main track, but it is not in the clear at the North end and it becomes necessary to

back the train in the siding for the purpose of clearing the North end and the engineer in obedience to a signal is backing his train, and has given three short blasts of his whistle indicating this, what would be the duty of the flagman under the circumstances, in the rear of that train?

(Obj. by Att'ys for Def't. Obj. overruled, to which Def't excepts.)

A. The flagman if it wouldn't clear at the North end, would have to go to the South end of the switch, open the switch and permit the train to run down sufficiently on the main line of the track to clear the North end.

167 Q. When he hears this signal given by the engineer what is his duty when it is going to back?

(Obj. by Att'ys for Def't. Obj. overruled, to which Def't excepts.)

A. He should have gone to the switch in obedience to the three whistles by the engineer and opened the switch so as the train could go on the main track and clear the North end.

Q. After the signal has been given, say the engineer starts backing and gets, say within 100 feet of the switch and he was backing slowly as is usual and customary, would there under such circumstances be any necessity for the flagman to put that train into emergency to stop it to keep it from going through that switch?

(Objection sustained.)

Q. Captain, say under the circumstances that I have mentioned the rear of the train is backing, the whole train is backing, and the rear, which is the caboose, is in 120 ft. of the switch at the South end, and is backing slowly as is usual and customary, and a brakeman or flagman has his South switch closed, what should he do under such circumstances?

168 (Obj. by Att'ys for Def't. Obj. overruled, to which Def't excepts.)

A. As I stated a while ago when there was a signal given by the engineer to back up, under the circumstances you have stated, it would be his duty to go open the switch so that the opposing train could come down.

Q. Say he hadn't done that and he was at the South end of the train towards the caboose, and it was backing slowly, and the switch was closed, what was the duty of the brakeman then?

(Objection sustained.)

Q. Say that a train was going slowly as is usual and customary, and that the brakeman had let the train get within 100 or 120 ft. of the switch, and the train slowly backing, as is customary, what should that brakeman do if the switch was closed?

(Objection sustained.)

Att'y for Pl'ff makes the following avowal: We expect him to answer: "He should have gone ahead of the caboose and thrown the switch."

Q. Say under the circumstances named a train is backing in obedience to a back up signal, having given three blasts in
169 answer to this signal, and it is going slowly at a rate that a man could outrun the train and reach the switch before the train could get there, what was his duty to do there, should he have applied the emergency, or should he have gone ahead and thrown the switch?

(Objection sustained.)

Att'y for Pl'ff makes the following avowal: We expect him to answer that "he should leave the train and run ahead of it and throw the switch."

Q. Saying that his train had only gone back a half car length or a car length, a train of 25 or 30 cars or more, and having only gone that distance, and was moving back slowly in obedience to this back up signal, and the brakeman was at the rear of the caboose what should he have done?

(Obj. by Att'ys for Def't. Obj. overruled, to which Def't excepts.)

A. If the train had just started and had only proceeded one car or one-half car length, it would not be going I presume more than 1½ miles or 1 mile per hour, a man should be able to run and get the switch open easily before the train could get to the
170 switch block.

(Obj. by Att'ys for Def't. Obj. sustained, as the question is what should he have done.)

Q. What should he have done under the circumstances named?

A. He should have gone to the switch and lined it up for the moving train.

(Cross-examination by Jno. B. Rodes, Att'y for Def't:)

Q. You said you had not railroaded any since 1905?

A. That is my recollection.

Q. You were passenger conductor then?

A. Yes sir, at that time.

Q. And you had been a passenger conductor for 20 years?

A. Yes sir, eighteen or twenty somewhere along there.

Q. And you had not run on a freight train for 25 years had you?

A. No, up to the time I quit I hadn't.

Q. You haven't had a position on a freight for twenty-five years?

A. Only as flagman, I have flagged on a freight since I run on a passenger train.

Q. On the L. & N. Railroad?

A. On the L. & N., on the Knoxville & Atlanta, via Blue
171 Ridge.

Q. How long did you flag?

A. Not very long.

Q. How long?

A. Possibly two or three weeks.

Q. Outside of that you have had no experience on a freight for 25 years?

A. No sir.

(Att'ys for Def't move the Court to exclude the testimony of Capt. James from the jury, which is overruled by the Court, and to which Def't excepts.)

(Redirect examination by B. F. Procter, Att'y for Pl'ff:)

Q. Aren't the same rules governing the operation of freight trains the same as for passenger trains?
A. Yes sir, with reference to all signals.
Q. And with reference to emergency?
A. Yes sir, with reference to emergency, and with reference to the application of all signals.

(Recross-examination by Jno. B. Rodes, Att'y for Deft:)

Q. Does a passenger train run like a freight, isn't there a great deal of difference in their operation?
A. You will have to be more explicit.
Q. In their jerking or jarring?

172 (Att'ys for Def't again move the Court to exclude the testimony of Capt. James from the jury, which is overruled, and to which Def't excepts.)

Q. You say in all cases where there is danger to life or property emergency may be used?
A. Yes sir.
Q. Were you also familiar with Rule 117 (*a*) where a train about to leave a siding must come to a full stop before the switch is thrown and no signal must be given to start the train until the switch is turned and the lock is secured through the hasp. Are you familiar with that rule?
A. Yes sir.
Q. And that was the Rule and prevailed at that time?
A. Yes sir.

Testimony of Will Hagan.

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. Where do you live?
A. In Bowling Green.
Q. How long have you lived here?
A. Often and on all my life.
Q. What experience have you had in railroading?
A. Right at twenty years' experience.
Q. In what capacity?
A. Brakeman, switchman and flagman.
Q. Did you ever run between here and Paris, Tennessee?
173 A. Yes sir.
Q. How long?
A. I broke about eighteen or twenty months, and I flagged about a year and a half.
Q. You have had about how many years' experience in all?

A. Something like twenty years.
Q. When did you last work for the L. & N.?
A. It has either been five or six years ago.
Q. Did you ever work for any Company besides the L. & N.?
A. Yes sir.
Q. What other Company?
A. Iron Mountain.
Q. Are you or not familiar with the Rules governing the use of air and air brakes and the transportation department of the L. N. in effect in 1908?
A. Yes sir.
Q. Have you at any time gone on the ground at Cumberland City and made any measurements to ascertain the distances between any points there?
A. Yes sir.
Q. When was that?
A. Last Friday.
Q. How far is it from the switch point at the South of that siding to a point North of the switch point where cars would be in the clear?
A. 110 ft.

Q. How far is it from the switch point at the South end to
174 the road crossing the first upon that siding as you come North?
A. Where you first hit the crossing?
Q. Yes sir.
A. I never measured that but it is something like 120 ft.
Q. How wide is that crossing?
A. Something like ten feet or more.
Q. What is the condition of that main track there, is it staright or curved between the switch points, the North switch and the South switch at that siding?
A. Almost straight, nearly straight, the main track of course is a little crooked where the siding comes in.
Q. The North switch and the South switch, what is the condition of that main line?
A. Straight.
Q. Did you assist in making any photographs on last Friday down there?
A. Yes sir.
Q. I will get you to examine photograph- No. 1, 2 and 3 and will get you to state if they are true and correct photographs of that track there, and if they were made at that time?

(Plaintiff here offers said photographs in evidence.)
(Obj. to introduction of said photographs in evidence by Att'ys for Def't which is overruled, and to which Def't excepts.)
175 Said photographs are here filed, marked 1, 2 and 3, and are hereto attached.

Q. No. 1, what does that photograph represent?
A. That is the South end switch.
Q. No. 2, what part of the track does that indicate?

A. That is up nearer the passenger depot, that is in the middle of the side track, the main track.

Q. Where was the camera sitting when that was taken?

A. Up near the tool house.

Q. Let me call your attention to No. 2 isn't it true that that was sitting up near the North switch looking South and taking in the depot?

A. Yes sir, that is right.

Q. Now No. 3, what is that a photograph of?

A. This is the middle picture, the middle section.

Q. Where did you set the camera there?

A. Set it near this switch point here, near the section house there.

Q. Is that section of the track taken looking North or South from that point?

A. It is taken from the North looking South.

Q. Say that a North bound freight that was so long that the siding at Cumberland City would not clear it at both ends took the siding there, and it was necessary for 103 to pass it, and the South end of the train was in the clear, and it was necessary to back the train upon the siding in order to clear the North end so that 103 could come in for the purpose of sawing by, and the engineer was backing
176 in obedience to the back up signal, and had given the back up signal of three short blasts of the whistle, and had begun to move slowly, and had moved over one half of a car length, and the flagman at the rear had done nothing to stop that train at all until it got within 120 ft. or to that railroad crossing, which you say is about 120 ft., and he was at the rear of that train at the caboose, and the South switch was set for the siding, what ought that flagman to do?

(Obj. by Att'ys for Def't. Obj. overruled, to which Def'ts except.)

Q. Just give his duties when the signal was blown first?

(Objection sustained.)

Q. Answer the first question.

A. If I understand it it was when the train was backing and he was at the rear end of that train at the caboose and the switch was set for the side track or the main track?

Q. It was setting for the main track, it was closed against the siding.

A. Do you want me to say what would be proper to do?

Q. Yes sir.

A. Why, open the switch and let the train back on up.

177 Q. What should he have done as soon as those signals were given, after the train was going to back?

A. Should have opened the switch and let his train back on up into the clear so the passenger train could get in from the North end.

Q. Are you familiar with the danger or the effect of applying the emergency on a freight train when backing?

A. With the conductor's valve, or angle cock?

Q. Well either one, say the angle cock, or the conductor's valve?

A. The angle cock if you open it wide open it would make a terrible jar, it would be dangerous to a man on top of a car or in the engine, or to a car of stock or anything, if you get hold of it and open it around it would make an awful sudden stop, it would just stop right there, just give a terrible jerk.

(Obj. by Att'ys for Def't. Obj. overruled, to which Def't excepts.)

Q. Is there any way to avoid putting on that sudden stop and stopping the train, if so, how?

A. Yes sir, if a man should take the valve and let the air out, just turn it that way and right back he will set the brakes and let the air out.

Q. What about it in emergency?

A. It just slaps the brakes on right at once with all the force the train has got on each and every car equipped with air.

178 Q. Is it proper railroading under such conditions as we have named for a flagman to apply the emergency?

(Obj. by Att'ys for Def't. Obj. overruled by the Court, to which Def't excepts.)

A. I consider it a very dangerous proposition when a man angle cocks a train, to the train, or whoever is in it.

Q. What if he could not get back to that switch in time and throw it, and it is either necessary for him to angle cock the train and put it into emergency or let the train go on through the switch, then what should he do?

(Obj. by Att'ys for Def't. Obj. overruled, to which Def't excepts.)

A. It would be safer to the people on the train, and to the train, to let him go through the switch.

(Obj. by Att'ys for Def't. Obj. overruled, to which Def't excepts.)

Q. Have you ever seen trains run through switches and are you familiar with the effect upon the switch to let the train run through?

A. Yes sir.

Q. Did you examine that switch point when you were there?

179 A. Yes sir.

Q. How long is that switch point?

(Objection sustained.

A. I know the standard of switch points.

Q. Is there any evidence that they are the same length?

(Objection sustained.)

Q. You saw that switch point down there?

A. Yes sir.

Q. In the event that that train had gone through that switch point and had gone through the switch, what would have been the effect?

A. It would have sprung the switch points, and gone on through the switch points.

Q. In order to repair it, what is necessary to do?

A. I have never repaired a switch point, but I have fixed them after we have run through them.

(Obj. by Att'ys for Def't. Obj. overruled, to which Def't excepts.)

Q. How do you do it?
A. Take a spike and spike maul and spike the switch down for the rail of the main track.

180 (Cross-examination by Jno. B. Rodes, Att'ys for Def't:)

Q. To what extent have you been assisting Mr. Procter in this case?
A. Not to any extent, Mr. Procter asked me to go down there.
Q. To what extent have you been working for him in this case?
A. I have been working for Mr. Procter.
Q. What did you go down there for?
A. He came and asked me to go down with him.
Q. How long did you spend there?
A. Two days.
Q. Haven't you been up in the Court room repeatedly talking to him about this case?
A. I have been here once.
Q. Wasn't you here yesterday morning?
A. I was summoned here yesterday morning.
Q. Wasn't you here before that?
A. Yes sir, I was once before.
Q. Wasn't you talking to him then?
A. He came to me and was talking to me.
Q. Wasn't you assisting him?
A. No more than I would any other man.
Q. When did he first come to you and want you to go with him down there?
A. Thursday morning.
Q. Do you know how he came to go to you to get you to go?
181 A. I do not, I don't know how he came to have me summoned.
Q. Are you familiar with the rule that neither this angle cock or conductor's valve should be used except in cases of emergency, are you familiar with that rule?
A. Yes sir.
Q. That is the rule?
A. Yes sir.
Q. And was the rule in 1908?
A. Yes sir.
Q. How long since you worked for the L. & N.?
A. Right at five years ago, at Evansville, Indiana.
Q. What were you doing there?
A. Switching, and I broke part of the time.
Q. Where did you brake?
A. From Howell, two ways out of there.
Q. For how long?
A. About three months and then went to switching.

Q. On the L. & N.?
A. Yes sir.
Q. When had you railroaded before that?
A. Something like a year before.
Q. Where then?
A. Right here in the Bowling Green yard.
Q. How long did you work there?
A. The first time I worked about four years switching in the yard.

182 Q. What had you done before that?
A. Had broke down the Memphis Branch, and flagged down the Memphis Branch.

Q. So up to five years ago for several years you had done no railroad work except switching in the yard here, and switching at Evansville, and doing a little work for two or three months out of Evansville?
A. What is the question?
Q. Since switching down here, was about nine years ago wasn't it?
A. Eight years ago.
Q. Since that the only work on the railroad you have done is to work a few months out of Evansville?
A. No sir, I have switched and broke both, but not for the L. & N.; the last work I did for the L. & N. was at St. Louis.

Question by Juror, Chas. Rogers: I would like to know the distance from the clear to this side track here, to this first frog, you say it is 110 ft., is this the switch point? A. Yes sir, 110 to the clear. Q. How far is it from the frog to the clear? A. I never measured it. Q. Is there any way to find out? A. It is 40 inches from the outside rail to the other outside rail, but from this frog here I don't know how far.

(Redirect examination by B. F. Procter, Att'y for Pl'ff:)

183 Q. To refresh your memory isn't it——

(Objection sustained.)

Q. To refresh your memory, you say you took this photograph from a point South of the switch point?
A. Yes sir.
Q. This one?
A. Yes sir.
Q. Now did you or not take the measure from that frog to the point of clearance, which is 40 inches?
A. Yes sir, it is 40 inches to the clearance.
Q. Now to further refresh your recollection isn't it 34 ft. from the clearance to the switch board?
A. I don't remember.

Testimony of JOHN SHARPE, recalled.

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. Captain Sharpe, you were upon the stand yesterday afternoon, and were asked whether or not there had been any change in the Rules and the use of the air signals and of the government of trains by the air brake since you were in the service of the railroad company, say in 1898 I believe it was you quit?

A. 1897.

184 Q. Have you examined the book of rules since that time to see if there was any difference in the rules governing the air brakes and the signals?

A. Yes sir, I examined it last night.

Q. Are they the same?

A. Just the same, see no difference at all.

Q. If a North bound freight train takes the siding at Cumberland City, to let the South bound passenger train pass, and the freight train is so long that the siding won't clear it at both ends, and the train is in the clear at the South end of the siding, and it becomes necessary to back that train upon the siding to clear the North end, so that 103 can pass by, and the flagman has set his switch for the main line against the siding at the South end, and the engineer in answer to the back up signal is backing South slowly, having given the three blasts of his whistle indicating that he was going to back up slowly, and it has moved a distance of about a half a car or a car length, what is the duty of the flagman in the rear when he hears this back up signal given?

(Obj. by Att'ys for Def't. Obj. overruled, to which Def't excepts.)

A. Well, it is his duty to go to the switch and be ready to throw it if the caboose gets near enough on the switch.

Q. Say he was at the caboose?

A. The flagman should not be at the caboose, knowing that

185 the other end is not clear, he should have been at the switch.

(Att'ys for Def't move the Court to exclude the above testimony from the jury, of Capt. Sharpe, which is sustained.)

Q. Say he has got his switch set for the main track, and hears this back up signal given, and the train starts backing what is his duty to do when he hears that signal given?

A. I think I have answered that the only thing for him to do is to look out for the hind end and to throw the switch if it is not long enough to hold it in the side track.

(Cross-examination by Jno. B. Rodes, Att'y for Def't:)

Q. When you were railroading was this Rule 117 (*a*) in force, "that a train about to enter or leave a siding should come to a full stop before the switch was thrown?"

A. Yes sir.

Q. It it didn't come to a full stop before the switch was thrown, it was the duty of the flagman to signal to stop it wasn't it?

A. To see if he could get the switch open, it would be going against the Rule for them not to stop so he could open the switch, backing out of the siding though it is different.

186 Q. Rule 117 (*b*) is "Running switches should not be made," isn't it?

A. Yes sir, but when they want to get out they are bound to back.

Q. But when they are backing it should come to a full stop before the switch is thrown—was that Rule in force?

A. Yes sir, it was in force.

Testimony of Miss Fannie Reddin.

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. Where do you live?

A. Paris, Tennessee.

Q. How long had you known W. H. Stewart?

A. About four months I think before he died.

Q. Did he stop at the place where you were living, where did you know him?

A. He came to our place to board in June before he died.

Q. What place was that?

A. At my sisters at Paris, in the Boothe Boarding House.

Q. In September that he is said to have been hurt?

A. Yes sir.

Q. What was his condition?

A. He complained of his head hurting him.

(Objection by Att'ys for Def't.)

Q. What was his condition?

187 A. He didn't seem to be well after he was hurt.

Q. Do you know of him taking any medical treatment there?

A. I gave him morphine to ease his head.

(Obj. by Att'ys for Def't. Obj. overruled, to which Def't excepts.)

Q. How long before he died?

A. I don't know whether it was next to the last trip or the last trip.

Q. How long before you heard he was dead, after he came home?

A. It was not long, just a little while.

Testimony of Mrs. Lon Hightower.

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. Where do you live?

A. On Clay Street.

Q. You are the wife of whom?
A. Lon Hightower.
Q. How far do you live from Mrs. W. H. Stewart?
A. Two doors.
Q. Did you know her husband, W. H. Stewart?
A. Yes sir.
Q. For how long before his death?
A. For ten years.
Q. Did you visit him just before his death?
188 A. Yes sir.
Q. Tell the jury in your own way his condition when you saw him from the time he came home?
A. He was complaining from the time he got hurt until his death.

(Objection sustained.)

Q. Just tell from his appearance what was his condition?
A. He was paralyzed.
Q. How long did that paralysis continue before his death?
A. Several days.

Testimony of Mrs. Sherrell.

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. Are you the mother of W. H. Stewart?
A. Yes sir.
Q. Where were you living at the time of his death?
A. Here in Bowling Green.
Q. Did you see him when he was said to have been hurt and prior to his death?
A. Yes sir.
Q. Tell the jury whether or not you were there when he died?
A. Yes sir.
Q. Was he paralyzed before his death?
A. Yes sir, for several days.
189 Q. Could he talk?
A. No sir.
Q. Where are his little children?
A. One of them is at school, and two at home.

Testimony of T. A. SORRELLS, recalled for further cross-examination, to which Att'y for Pl'ff objects, which is overruled, and to which Pl'ff excepts.

(Cross-examination by Jno. B. Rodes, Att'y for Def't:)

Q. You stated upon your examination that in the various trips after September 8th that you made with Mr. Stewart of which the cards show, and to which you testified to didn't you?
A. Yes sir.

Q. On any of these trips did you hear anything about his injury or any complaints made by him?

A. He never made any to me about it?

Q. You were his fireman and in the same cab with him?

A. Yes sir.

Q. Mr. Sorrells, in September 1908, was there a Rule of the Company involving the use of the conductor's valve or the valve in the rear of the caboose, in what cases it was to be used, and the angle cock?

A. Yes sir, the conductor's valve.

Q. I will ask you whether or not this rule was in force at that time, page 8, from the Special Rules Governing the use of Air
190 Brake and Whistle Signals, Revised January 6th 1908. I will read Rule as follows: "The train line valve must always be applied on freight trains, but neither this nor the conductor's valve must be used, except in cases of emergency, and when so used must be held open until the train stops, and then closed. If conductor's valve can not be reached, open cock in the rear. In using the air signal, pull directly down on the cord during one full second for each intended blast of the signal whistle, and allow two full seconds to elapse between the pulls. For trains of exceeding eight cars, this time should be lengthened in proportion. On account of the different location of the conductor's valve in sleepers, private cars, and equipment of various roads, trainmen should ascertain their location as soon as possible after taking charge of a passenger train. On our own equipment the handle must never be placed inside of a closet, but at a point where it will be accessible from the body of the car." Did that Rule apply at that time?

A. Yes sir.

Q. State whether or not if the angle cock is used to stop a train, how it must be used?

A. It must be left open until the train comes to a stop.

Q. Is that used in Emergency?

A. Yes sir.

Q. And held wide open until it comes to a stop?

A. According to the Rule that is the way it should be used?

191 Q. Couldn't you make a service application by the use of the angle cock?

A. There is no way of making a service application with the conductor's valve.

Q. Who can make it?

A. The engineer.

Q. He can draw off 10 lbs. of air, and if he wants to further slow the train he can draw off as much as necessary?

A. Yes sir.

Q. Can that be done with the angle cock?

A. No sir.

(Redirect examination by B. F. Procter, Att'y for Pl'ff:)

Q. Couldn't a brakeman bleed off the train line and apply the brakes gradually with the angle cock?

A. I don't know what a brakeman can do.
Q. You don't know then?
A. I don't know whether he can or not; they have bleeder cocks, but not for that.
Q. If the slack is bunched in a train by the emergency application, won't the air bleed off and let the slack run out again?
A. Not if you left the conductor's valve open it won't.
Q. Do you mean to say that if you leave the conductor's valve set the air would remain in the cars?
A. I don't suppose it would unless it leaks in some of the
192 train lines.
Q. How do you release the brakes when you go into emergency?
A. By closing the conductor's valve if he uses it, and if the engineer uses it he releases the brakes.
Q. When you do it with the angle cock?
A. You have to close it before it will pump up.
Q. How long would it take you to pump up that air?
A. It is owing to the condition of the train line.

(Recross-examination by Jno. B. Rodes, att'y for def't:)

Q. Where is it pumped up from?
A. From the engine.
Q. He spoke of bleeding something, you have bleeding cocks on the train for that?
A. Yes sir on the cars.

Testimony of O. L. Hill, Recalled for Further Cross-examination, to which Att'y for Pl'ff Objects, which is Overruled, and to which Ruling Pl'ff Excepts.

(Cross-examination by Jno. B. Rhodes, att'y for def't:)

Q. Mr. Hill, you applied the emergency on there with the air valve in the rear of the caboose, with the angle cock?
A. Yes sir.
Q. Can the angle cock be used for any other purpose than applying the emergency?
A. Only in coupling the train.
193 Q. Can any service application be made with it?
A. No sir.
Q. Can the engineer make a service application and slow down?
A. Yes sir in his cab.
Q. Can that be done with the angle cock?
A. No sir.
Q. Are you familiar with the Rule under which the angle cock may be used in cases of emergency and held open until the train stops?
A. I don't know what page, but I am familiar with the rule.
Q. Is that what you do?
A. Yes sir.

Att'ys for Pl'ff move the Court to exclude this testimony of O. L. Hill from the jury, which is overruled, and to which Att'ys for Pl'ff except.

(At the close of all of Plaintiff's testimony, the defendant moved the Court to peremptorily instruct the jury to find a verdict for defendant, which is overruled by the Court, to which ruling Defendant excepts.

194 COMMONWEALTH OF KENTUCKY,
County of Warren, sct:

I, Belle Galloway, Official Stenographer for the Warren Circuit Court, do certify that the foregoing transcript is a true and correct copy of all the evidence introduced and heard and offered to be introduced and rejected and all exceptions, objections and avowals, concerning the same, as well as all papers and exhibits offered to be or used as evidence in said trial.

Witness my hand this June 17, 1912.

BELLE GALLOWAY,
Official Stenographer,
Warren Circuit Court.

Examined, attested and approved this November 8, 1912.

McKENZIE MOSS,
Judge Warren Circuit Court.

Stenographer's Fees:

Attendance.....	$10.00
Transcript.....	46.80
	$56.80

195 The following is a copy of the order filed in the County Court on the 10th. day of October, 1908 with the above affidavit:

At a Called Term of the Warren County Court, Held in and for Warren County on the 10th Day of October, 1908.

Present, Hon. Chas. Drake, Judge, presiding.

On motion, it is ordered that Jeanette Stewart be and is appointed administratrix of the estate of W. H. Stewart, deceased.

Thereupon came said Jeanette Stewart into open Court and executed bond to the Commonwealth of Kentucky, conditioned as the law requires with Sarah Sherrell as surety thereon, the Court filing the liability of said surety in the penal sum of $125.00, which said bond is accepted and approved by the Court; and thereupon said Jeanette Stewart took the oath as the law directs.

A copy attest:

E. C. SMITH, *Clerk.*
D. C. GARVIN, *D. C.*

The following is a copy of the supersedeas bond executed in office 23 day of November, 1912:

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
against
WM. H. STEWART'S ADM'R'X, &c., Appellee.

Upon an Appeal from a Judgment of the Warren Circuit
196 Court Rendered 12th Day of April, 1912.

Whereas, said appellant, Louisville & Nashville Railroad Company, — an appeal from the judgment of the Warren Circuit Court, rendered at its April Term, 1912, against it in favor of the appellee, for the sum of $20,000.00 (twenty thousand dollars) and costs and appellant desires to supersede the whole of the judgment above mentioned;

Now, we, Louisville & Nashville Railroad Company, principal, and Citizens Trust & Guaranty Co. of West Va., surety, do hereby covenant to and with the appellee, Wm. H. Stewart's Adm'r'x &c. that the appellant will pay to the appellee all costs and damages that may be adjudged against the appellant on the appeal, and also that they will satisfy and perform the whole of the judgment above stated, in the event that it should be affirmed, and any judgment or order which the Court of Appeals may render, or order to be rendered by the inferior Court, not exceeding in amount or value the whole of the judgment aforesaid.

Witness our hands, this 23rd. day of November, 1912.

LOUISVILLE & NASHVILLE RAILROAD CO.,
CITIZENS TRUST & GUARANTY CO. OF WEST VA.,
By JAMES C. SIMS, *Att'y-in-Fact.*

The following is a copy of the power of attorney attached to said bond:

Citizens Trust & Guaranty Company of West Virginia, a corporation, organized under the laws of the State of West Virginia, with its principal office at Parkersburg, West Virginia, and duly licensed and authorized to become surety on bonds within the Commonwealth of Kentucky, hereby makes, constitutes and appoints James C. Sims and John B. Rodes of Bowling Green, Kentucky, its true and lawful attorney- for it and in its name to sign, seal and deliver
197 a certain supersedeas bond for the Louisville & Nashville Railroad Company, to be given in the Warren Ciruit Court in the case of William H. Stewart's Adm'r'x vs. Louisville & Nashville R. R. Co. hereby ratifying and confirming all and singular the actions of the said attorney'-in-fact in and about the execution and delivery of said bond, to all intents and purposes the same as if said bond had been executed by the proper officers of the said Guaranty Company at its Home office. This power of attorney is to be attached to or filed with said bond when so executed.

In testimony whereof, the said Guaranty Company has caused its corporate name to be signed hereto and its corporate seal to be affixed hereto and attested by its proper officers thereunto duly authorized, this 29th day of May, 1912.

CITIZENS TRUST & GUARANTY COMPANY OF WEST VIRGINIA,

[SEAL.] By W. G. PETERKIN, *President.*

Attest:

J. W. KNAPP, *Secretary.*

STATE OF WEST VIRGINIA,
Wood County, To-wit:

I, J. L. Knapp, a Notary Public in and for said County
198 do certify that W. G. Peterkin, personally appeared before me in my said county, and being by me duly sworn, did depose and say that he is the President of Citizens Trust & Guaranty Company of West Virginia, the corporation described in the writing above bearing date the 29th day of May, 1912, authorized by said corporation to execute and acknowledge deeds and other writings of said corporation, and that the seal affixed to said writing is the corporate seal of said corporation and that said writing was signed and sealed by him in behalf of said corporation, by its authority duly given. And the said W. C. Peterkin acknowledged the said writing to be the act and deed of said corporation.

Given under my hand and official seal this 29th day of May, 1912.

[SEAL.] J. L. KNAPP,
Notary Public.

My commission expires August 29, 1917.

Financial Statement of the Citizens Trust & Guaranty Company of West Virginia as of June 30, 1912.

Company began business July 31, 1899.

Assets.

Real estate Home office	$49,000.00
Real Estate other than home office	28,223.96
Furniture and fixtures	450.00
Railroad and other bonds	392,934.70
Bank stocks	29,500.00
Other stocks	27,000.00
Cash in banks and home office	27,675.66
Premiums due for bonds written	31,190.24
Loans on mortgages	18,479.71
199 Loans on Collateral	7,100.00
Time Loans	1,040.10
Other assets	21,200.76
	$633,795.13

Liabilities.

Capital stock paid in cash	$400,000.00
Surplus	100,000.00
Undivided profits	23,302.51
Reserve or unearned premiums	50,000.00
Reserve for possible losses	50,670.00
Reserved for incidental expenses, bills not received	850.00
Accounts payable	972.62
Dividend No. 29	8,000.00
	$633,795.13

Dividends.

Date of last declaration, June 1912.
Date payable, July 1, 1912.
Amount, $8,000.00.
Total dividends paid to date, $231,000.00.

We, W. G. Peterkin, President, and J. H. Knapp, secretary, of the Citizens Trust & Guaranty Company of West Virginia, certify under oath that the above statement is true and correct.

W. G. PETERKIN,
President.
J. H. KNAPP.

Subscribed and sworn to before me this 3rd day of July, 1912.
[SEAL.] J. L. KNAPP,
Notary Public in and for Wood County, West Virginia.

My commission expires August 29, 1917.

200 The following is a copy of the supersedeas:

THE COMMONWEALTH OF KENTUCKY:

Warren Circuit Court.

L. & N. R. R. Co., Appellant,
against
WM. H. STEWART'S ADM'R'X, Appellee.

Supersedeas.

I do certify that an appeal has been granted from this Court for a judgment obtained by Wm. H. Stewart's Adm'r'x against L. & N. R. R. Co. for ($20,000.00) twenty thousand dollars and costs in the Warren Circuit Court, at its April Term, 1912, and that a supersedeas bond has been executed as required by section 749, Codes of Practice. Therefore the appellee and all others are commanded to stay proceedings on the whole of the judgment above recited.

Witness, my hand as Clerk of said Court, this 23rd day of Nov'r, 1912.

O. A. ROUP, *C. W. C. C.*

The following is a copy of the return indorsed thereon:

Executed on Mrs. Wm. H. Stewart's Adm'rx by delivering her a copy of the within supersedeas. Nov. 28, 1912.

W. L. McNEAL, *S. W. C.*
By T. J. HOLMAN, *D. S.*

201 STATE OF KENTUCKY,
County of Warren, sct.

I, O. A. Roup, Clerk of the Warren Circuit Court, do certify that the foregoing 104 pages, with the bill of evidence attached, contain a true, correct and complete transcript of the entire record, process excepted, of the case late- pending in the Warren circuit court, wherein Wm. H. Stewart's Administratrix, Jeanette Stewart, was plaintiff, and the Louisville & Nashville Railroad Company was defendant, as same appears to us of record.

Given under my hand, this 4th day of December, 1912.

O. A. ROUP, *Clerk,*
By —— ——, *D. C.*

202 Court of Appeals of Kentucky.

December 19, 1913.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
WILLIAM H. STEWART'S ADMINISTRATRIX, Appellee.

Appeal from Warren Circuit Court.

Opinion of the Court by Judge Turner, Reversing.

On September 5th, 1908, William H. Stewart, an engineer employed by appellant, while running a train from Paris, Tenn., to Bowling Green, Ky., was injured, and as a result thereof died twenty two days later from inflammation of the brain. Thereafter his wife qualified as administratrix, and instituted this action as personal representative seeking damages under the Employers' Liability Act of April, 1908. The jury returned a verdict for $20,000, and from a judgment on that verdict this appeal is prosecuted.

Upon the occasion in question the train was coming North from Paris, Tenn. towards Bowling Green, Ky.; when it reached
203 Cumberland City, Tenn. it met a Southbound freight train, and accordingly, the Northbound train went in on the single switch which was at that point, so that the freight train might proceed South; but there was also due at that point a Southbound passenger train in a short time, and Stewart's train had to wait there

until it also went South. Stewart's train had to clear the main track first to let the freight train proceed South, and later to permit the passenger train to pass. Stewart's freight train was a long train, and there were several cars standing on the side-track when his train went in on it. The cars so standing were coupled to the engine and pushed ahead of the engine on the side-track as it proceeded North; when the freight train had gone far enough North to clear the main track at the South end of the switch to enable the freight train standing on the main track to pass South, the cars so pushed ahead of the engine on the side-track were either on the main track at the North end of the switch or so close to the main track as to foul it, or not to be "in the clear" of the main track upon which the passenger train which was shortly expected from the North must pass; the flagman in charge of the rear-end of the train, after his train was on the switch, threw the switch and locked it, as it was his duty to do, so that not only the freight train but the expected passenger train might proceed South. After the freight train had gone South the conductor, who was up near the engine and cars near the North end of the switch, signaled the engineer to back his train,
204 evidently with the purpose of leaving the North end of the switch clear so that the passenger train might pass; a flagman had already been sent out to flag the approaching passenger train to the North.

There were three crossings going over the side-track, one very near the South end of the switch, and the other two were blocked by the standing freight train; it was the duty of the Company to keep these crossings open, and the rear flagman as soon as he had closed the switch started up to the middle crossing to see if anybody wanted to get through, and if necessary to open it; but before he reached the middle crossing the conductor up at the front of the train gave the engineer a signal to back his train, and this he proceeded to do; the rear flagman, whose duty it was not only to keep the crossings open, but to throw the switch at the South end so that the switch would not be split, and to avoid a possible derailment of cars, immediately started back while the train was moving for the purpose of throwing the switch; but when he reached the rear of the train, doubting whether he had time to unlock and throw the switch before the caboose reached it, he put on the emergency air-brake from the rear of the train called an angle-cock, and stopped the train before the caboose reached the switch, and just about where it fouled the main track. The putting on the emergency in this way from the rear had the effect to immediately stop
205 the whole train, and cause a considerable jerk or jar, and it is claimed by the plaintiff that this jerk or jar threw him up against the side of the cab of the engine and bruised his shoulder and injured his head in such a way as resulted in his death.

The crew of the train consisted of five men, Jones, the conductor; Stewart, the engineer; Minor, the brakeman at the front of the train, and Hill, the flagman at the rear of the train, and Sorrels, the fireman.

Jones, the conductor, did not testify upon the trial, but we have the testimony of Minor, Hill and Sorrels.

The testimony is that the siding was not long enough to hold Stewart's train and the cars which were already on it, and at the same time be clear of the main track at both ends, so that it was necessary to back his train till he cleared the main track at the North end of the switch so that the passenger, a much shorter train, could pull down the main track and stop clear of the North end of the switch till the freight train could pull up North so as to clear the main track at the South end; in other words as expressed by railroad men, they had to "saw-by". Sorrels, the fireman, testified that the conductor gave Stewart the signal, and the engineer gave three blasts of the whistle, and then started back slowly, and while so backing slowly and after the train had backed a short distance the flagman, Hill, put on the emergency application of the air-brake at the rear and stopped the train suddenly, and that the jar threw Stewart up against the window and Stewart claimed
206 immediately afterwards that it had hurt his head and shoulder; that the jar was neither hard nor soft, but medium.

Minor states that the emergency application caused a "right smart" jar, that it stopped every car including the engine at once, and that such an application might endanger some part of the train, or might result in injuries to persons around or on the train.

Hill, the rear flagman, who applied the air, testified that he applied it for the purpose of preventing the train "from splitting the switch", and possibly derailing one or more cars; that he did not apply the brakes for the purpose of "bunching the slack," although its application did have that effect, and did have the effect to keep the rear end of the train from going on the main track at the South end of the switch. He testified that after the train had pulled on to the side-track from the main track he threw the switch and locked it; that it was his duty then to go to the middle crossing which was blocked by the freight train to see if anyone wanted to get by, and to cut the train if necessary and let them by; and after he had locked the switch he started to the middle crossing which was from four to six hundred feet distant from the lower crossing near where the caboose stopped; that he had gone about one-third of the way when the train began to back, and he immediately hastened back towards the rear of the train, and thinking he did
207 not have time to unlock and throw the switch before the train got to the main track, he put on the emergency from the rear and stopped the caboose before it reached the main track and about at a point where it would foul the main track.

Two rules of the company were introduced in evidence as follows:

No. 1. "The emergency or quick action must never be used unless it is to avoid injury to life or property. No excuse will be taken for its use except as stated. The necessity for its use can be readily avoided by returning the handle to lap immediately after the release of the first application, and then applying the brakes lightly before the engine reached the exact spot".

It was shown, however, that the latter sentence had no application where the air is applied from the rear of the train.

The other rule introduced was as follows:

No. 2. "A train about to enter or leave a siding must come to a full stop before the switch is thrown, and no signal must be given to start the train until the switch is turned and the lock is secured through the hasp. No attempt should be made to close a switch until the last wheels are off the switch rails. The person who locks a switch must grasp the chain and pull the lock and see that it is securely fastened, and after having done so, must look twice at the switch rails to see that they are in their proper position.
208 At meeting or passing points the employe attending the switch will, after locking it to main track, take a position not nearer than ten feet from the switch until the expected train has passed."

The petition charged in general terms that the death of Stewart was brought about by the negligence of the agents and employes of defendant, but does not specify in detail the negligence complained of; it is urged by appellant that the demurrer to the petition should have been sustained because the plaintiff was proceeding under a Federal Statute and should have been required to set up with particularity the acts of negligence complained of as he would have been required to do in the Federal Court; but the Act of Congress does not undertake to prescribe the mode of procedure where the action is pending in the State Courts except in certain particulars not here involved. So that the general allegation of negligence being held sufficient in this State prior to the enactment of the Employers' Liability Act, such a plea will be held good even when proceeding under that Act.

It is urgently insisted for appellant that it was entitled to a peremptory instruction. We have given above the substance of the evidence, and must say that so far as the evidence shows any negligence upon the part of Hill, the rear flagman, that appellant's contention should have been sustained. It was Hill's duty to lock the switch at the South end of the siding just as he did. Under one of the rules quoted it was his duty to remain near that
209 switch until the expected train had passed on the main track, but he was relieved from that duty by the further imperative duty which devolved upon him of seeing that the middle crossing was kept open for traffic; it was the duty of the company under the laws of Tennessee to keep those crossings open, and Hill immediately after closing the switch proceeded to the performance of this latter duty, and before he could get to the middle crossing the train began to back, and he knowing that the switch was closed immediately ran back towards the rear of the train, but finding he did not have time to unlock and throw the switch in order to prevent the "splitting of the switch" and possibly the derailment of some of the cars, and consequent delay in traffic which would have resulted therefrom, he did the only thing which he could reasonably have done, and that was to apply the emergency air-brake by angle

cock; and it is doubtful from the evidence whether he then applied it in time to prevent the freight train from fouling the main track.

But, the conductor was guilty of negligence; he gave the order to back the train when he knew or should have known that the switch at the South end of the siding was locked; he knew or should have known that the rear flagman, after locking that switch, had to see to the keeping open of the middle crossing, and, therefore, knew or should have known that the flagman was not at the
210 switch when he gave that order to back, and that if the rear end of the train backed on to the main track at the South end of the switch it would split the switch and possibly derail some cars and delay traffic. He knew that under the rule above quoted that the train before entering or leaving a siding must come to a full stop before the switch is thrown, and that until the switch is thrown and the lock secured no signal must be given for starting. The conductor knew that his train was too long for that siding to be "in the clear" of the main track at both ends; he necessarily knew that when he backed that train so as to clear the main track at the North end of the switch that it would probably run out on to the main track at the South end, and before giving that order he should have known either that the switch was open or that the flagman was there to open it. The front flagman had been sent ahead to flag the approaching passenger train, and there was no such emergency existing to clear the North end of the switch as justified him in giving the order to back until he knew that the switch at the South end was open or that the flagman was there for the purpose of opening it. For these reasons the motion for a peremptory instruction was properly over-ruled.

But the instructions of the Court were radically wrong in several particulars. The correct measure of damages in such cases has been so often pointed out by this Court that it would seem unneces-
211 sary to cite authority; but in this case in the first instruction the plaintiff is permitted to recover such a sum as will fairly compensate his estate for his death. Instructions similar to that have been frequently condemned upon the idea that it might authorize the jury to consider mental anguish, and loss of companionship, and so on. The true measure of damages is that sum that will compensate his estate for the destruction of his power to earn money. On another trial of the case the second instruction which deals alone with the negligence of Hill, the flagman, if the evidence is the same, will under our view of the case probably be eliminated, and for that reason we will not consider it. Instruction No. 3 is erroneous for the same reason as instruction No. 1; it should have been in substance that the measure of recovery is such sum as will compensate his estate for the destruction of his power to earn money, and that the jury may in arriving at this amount consider all the evidence in the case bearing upon this question. Instruction No. 4 should be given on a new trial in conformity with the rule laid down in Nashville, Chattanooga & St. Louis Railroad Company v. Banks, this day decided, 156 Ky. 609.

The Court will also upon the return of the case give such instruc-

tions to the jury as will apportion the ultimate recovery, if any, between the beneficiaries as is suggested by the Supreme Court in the case of Gulf, Colorado, &c., Ry. Co. vs. McGinnis, 228 U. S. 173.

212 For the reasons indicated the judgment is reversed, with direction to grant appellant a new trial and for further proceedings consistent herewith.

Benjamin D. Warfield, Louisville, Ky.; Sims & Rodes, Bowling Green, Ky., for appellant.

Wright & McElroy, Bowling Green, Ky.; Hazelrigg & Hazelrigg, Frankfort, Ky., for appellee.

[Endorsed:] Dec. 19, '13. L. & N. vs. Stewart's Adm'x.

213 Court of Appeals of Kentucky.

Feb. 27, 1914.

Louisville & Nashville Railroad Company, Appellant,
vs.
Wm. H. Stewart's Administratrix, Appellee.

Response to Petition for Modification and Rehearing.

Opinion of the Court by Judge Turner.

Appellant's petition for a modification of the opinion insists that the language used by the Court in discussing whether the conductor Jones was negligent may be interpreted by the lower court upon a new trial as definitely determining that the conductor was negligent, so that the parties might be precluded upon another trial from introducing evidence upon that subject. But such was not the purpose of the Court; it was merely intended to point out that there was sufficient evidence of negligence upon the part of the conductor to authorize the submission of the case to the jury.

214 Overlooking for the instant that this case was tried under the Federal Employers' Liability Act, and by reason of the haste and confusion incident to the closing day of a term of this Court, the Kentucky rule as to the measure of damages was incorrectly directed to be given on another trial instead of the measure of damages prescribed by the Federal Statute.

Upon a new trial the measure of damages will be given under the Federal Statute as construed by the Supreme Court of the United States, all of which is carefully gone into and pointed out in the case of C. & O. Ry. vs. Dwyer's Adm'x, 157 Ky. 590.

To the extent indicated the opinion is modified, and the petitions for modification and rehearing in all other respects are overruled.

BENJAMIN D. WARFIELD, Louisville, Ky.,
SIMS & RODES, Bowling Green, Ky.,
For Appellant.
WRIGHT & McELROY, Bowling Green,
HAZELRIGG & HAZELRIGG, Frankfort, Ky.,
B. F. PROCTER, Bowling Green,
For Appellee.

215 Be it remembered, that the following is a true, correct and complete copy of the record, so much thereof as ordered by the schedule herein copied, of the case late pending in the Warren Circuit Court in which W. H. Stewart's Adm'r'x, sueing for herself as widow, and James Theodore Stewart, Wm. Albert Stewart and Christine R. Stewart, infant children of said decedent was plaintiff, and the Louisville & Nashville Railroad Company was defendant.

Please before the Hon. McKenzie Moss, Judge.

The following is a copy of an order entered in open court on the 14 day of March, 1914:

Warren Circuit Court.

WM. H. STEWART'S ADM'R'X, Plaintiff,
v.
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Order.

On defendants motion this cause is now reinstated upon the docket of this court. Thereupon came the defendant, Louisville & Nashville Railroad Company, and filed in open court mandate of the Court of Appeals in this case, which is in the words and figures as follows, to-wit:

THE COMMONWEALTH OF KENTUCKY:

The Court of Appeals. Dec. 19th., 1913, Feb'y 27th, 1914. 191.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
v.
216 WM. H. STEWART'S ADM'X, Appellee.

Appeal from a Judgment of the Warren Circuit Court.

The Court Being sufficiently advised, it seems to them the judgment herein is erroneous.

It is therefore considered that said judgment be reversed, and cause remanded with directions to grant appellant a new trial and for further proceedings consistent with the opinion and modified opinion herein. Which is ordered to be certified to said Court.

A copy. Attest:

ROBERT L. GREENE, *C. C. A.*,
By A. ADAMS, *D. C.*

Issued Feb'y 27, 1914.

And it is ordered that the judgment heretofore entered upon the verdict of the Jury be and the same is hereby set aside and held

for naught and that defendant be granted a new trial in accordance with the opinion of the Court of Appeals rendered in this cause and this cause is now continued.

The following is a copy of an order entered in open Court on the 26th day of May, 1914.

Warren Circuit Court.

W. H. STEWART'S ADM'X, Plaintiff,
vs.
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Order.

This day came the defendant and tendered in open Court and asked to file an amended answer herein, to which the plaintiff objected and notwithstanding the objections, the Court permitted the same to be filed, to which the plaintiff objected and excepted, and thereupon came the plaintiff and filed reply to said amended answer.

217

Affirmative matter of reply, by consent, controverted of record.

The following is a copy of the amended answer filed in open court on the 26th day of May, 1914:

Warren Circuit Court.

STEWART'S ADM'R'X, Plaintiff,
v.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Amended Answer.

Came defendant, for amendment to its answer herein, states that decedent, W. H. Stewart, prior to his death held an accident policy in the Locomotive Engineers Mut. Life & Accident Insurance Company wherein his estate should recover for the destruction of his life by accident the sum of $5,000.00; that upon and after his death the plaintiff collected upon the said policy the sum of $5,000.00, which was paid to and received by her for the use and benefit of herself and her three children as a pecuniary benefit or compensation for the destruction of her husband's life by the same alleged accident as is set out in their petition herein; that said sum of $5,000.00 was apportioned, one half to herself and one sixth to each of said children, and this defendant avers should any judgment be rendered against it in the case, the same should be credited by the aforesaid sum of $5,000.00 in the proportions as between widow and children as above set out.

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Wherefore, this defendant prays the judgment of this court ac-

cordingly, and as in its answer herein and for all proper and general relief.

SIMS & RODES.

The following is a copy of the reply filed in open court on the 26th day of May, 1914:

Warren Circuit Court.

STEWART'S ADM'R'X, Plaintiff,
v.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Reply.

The plaintiff for reply to the amended answer this day filed admit that plaintiffs decedent carried upon his life $5,000.00 insurance, but they deny that it was payable to his estate, and deny that it was received by the plaintiff as administratrix, and deny that it was received for the benefit of herself and three children as a pecuniary benefit and compensation or otherwise for the destruction of her husband's life. They deny that the $5,000.00 was apportioned at all, or that she received one half to herself and one sixth to each of the said children, and they deny that in the event of recovery of judgment the said $5,000.00 should be proportioned between her and her said children as widow and children, or should be apportioned at all.

219 Further answering, plaintiff says that said policies were payable to herself and she assisted in paying the premiums on the policies, and after the death of her husband paid $— out of same on the indebtedness left by him.

Further answering, she says that her said decedent left to her no property other than said insurance, which was received by her in her individual capacity as the beneficiaries named in said policy.

Wherefore, she prays &c.

B. F. PROCTOR,
Att'y for Pl'ff.

The following is a copy of an order entered in open Court on the 26th day of May, 1914:

Warren Circuit Court.

W. H. STEWART'S ADM'R'X
v.
L. & N. R. R. Co.

Order.

Came defendant and filed exceptions to the depositions filed by plaintiff.

Came parties, by attorneys, and the issue being joined, thereupon came the following jury: C. C. Eadens, W. J. Wade, Holly Mitchell, James Grubbs, W. P. Waters, A. F. Lowe, W. E. Drake, Gene Finney, Charles Carter, Henry Shanks, Joe Mercer and Robert Motley, who were sworn to well and truly try the issue and a true verdict render, and after hearing statements of counsel, there not being time to complete the trial on today, the jury were permitted to — until tomorrow morning under the usual admonitions and instructions of the Court, not to speak *of* themselves or permit any one to speak to them concerning this case.

Ordered that the official stenographer, Belle Galloway, report the testimony had and heard on the trial of this case.

The following is a copy of an order entered in open Court on the 27th day of May, 1914:

Warren Circuit Court.

W. H. STEWART'S ADM'R'X, Plaintiff,
v.
L. & N. R. R. Co., Defendant.

Order.

Again came parties by attorneys, and the jury sworn in on a former day and after hearing part of the testimony, there not being time to complete the trial on today, the jury were permitted to go until tomorrow morning under the usual instructions and admonitions of the Court not to speak *of* themselves or permit any one to speak to them concerning this case.

The following is a copy of an order entered in open court on the 28 day of May, 1914:

Warren Circuit Court.

W. H. STEWART'S ADM'R'X
v.
L. & N. R. R. Co.

Verdict and Judgment.

Again came parties, by attorneys, and the jury sworn in on a former day and after hearing the remainder of the testimony, instructions of the Court and argument of counsel, retired to their room to consider of their verdict and afterwards returned into open court the following verdict:

"We the Jury find for

	Mrs. Stewart	$2,472.00
221	The oldest child	2,472.00
	Second child	2,472.00
	Youngest child	4,469.00
	Total	$11,885.00

W. J. WADE, *Foreman.*"

It is therefore adjudged by the Court that the plaintiff recover of the defendant eleven thousand eight hundred and eighty five dollars ($11,885.00), apportioned as provided in the verdict, $2472.00 for the benefit of herself as widow; $2472.00 for the benefit of her infant son, Jas. Theodore Stewart; $2472.00 for the benefit of her infant son Wm. Albert Stewart; and $4469.00 for the benefit of her infant daughter, Christine R. Stewart, and her costs herein expended, to all of which judgment defendant excepts.

The officers of the Court are given a lien on the above judgment for their fees herein.

The following is a copy of an order entered in open court on the 30 day of May, 1914:

Warren Circuit Court.

W. H. STEWART'S ADM'R'X
v.
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Order.

This day came the plaintiff and moved for a new trial, and filed written grounds in support of the motion.

222 The following is a copy of the motion for New Trial filed in open court on the 30 day of May, 1914:

Warren Circuit Court, May Term, 1914.

W. H. STEWART'S ADMINISTRATRIX
v.
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Motion for New Trial (Plaintiff's).

The plaintiff comes and moves the Court to set aside the verdict of the Jury and the judgment of the Court thereon and grant her a new trial in this cause, and for cause says:

1. The Court erred to the prejudice of the substantial rights of the plaintiff in giving to the jury instructions 1, 2, 3, 4, 5 and 6, all or

any of them, to all of which plaintiff objected and excepted at the time.

2. That the Court erred on the trial in excluding from the jury important evidence and erred in like manner in admitting incompetent evidence to the jury, especially in permitting defendant to prove that plaintiff collected life insurance to the amount of $5,000 after her husband's death on policies made payable to her.

The evidence excluded and that admitted and the ruling of the Court thereon will be fully shown in the official transcript of the evidence made by the official stenographer, which will be filed as part of this motion. Plaintiff says by reason of the ruling aforesaid the substantial rights of the plaintiff as administratrix and the other beneficiaries of the estate were prejudiced and materially affected, and she was prevented from having a fair trial.

223 3. That the damages awarded plaintiff are too small to compensate her and the other beneficiaries for the injuries.

B. F. PROCTOR,
WRIGHT & McELROY,
Att'ys for Pl'ff.

The following is a copy of an order entered in open court on the 30 day of May, 1914:

Warren Circuit Court.

W. H. STE-ART'S ADM'R'X
v.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Order.

This day came defendant, Louisville & Nashville Railroad Company, and filed its motion and grounds for a new trail herein.

The following is a copy of the motion entered in open Court on the 30 day of May, 1914.

Warren Circuit Court.

W. H. STEWART'S ADM'R'X
v.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Motion and Grounds for New Trial (Defendant's).

Comes the defendant, Louisville & Nashville Railroad Company, and moves the Court to set aside the verdict of the jury herein, and to grant to the defendant a new trial upon the following grounds, to-wit:

(1) Because the damages given by the jury in their verdict are

excessive and appear to have been given under the influence
224 of passion and prejudice.

(2) Because the verdict is not sustained by sufficient evidence and is contrary to law.

(3) Because the Court erred in refusing, on motion of defendant at the conclusion of plaintiff's testimony to peremptorily instruct the jury to find a verdict for the defendant; and because the Court again erred at the conclusion of all the testimony to instruct the jury to find a verdict for the defendant.

(4) Because the Court erred in giving to the jury instructions Nos. 1, 2, 3, 4, 5, 6 and 7, and each of them.

(5) Because the Court erred in refusing to give to the jury, on motion of defendant, instructions marked A, B, C and D and each of them.

(6) Because the Court erred, in admitting, over the objection of the defendant, incompetent evidence to go to the jury, and because the Court erred in the exclusion of competent evidence offered by defendant, all to the prejudice of defendant.

(7) Because the Court erred in overruling the defendant's motion, made at the conclusion of plaintiff's examination in chief by her counsel before the jury, to discharge the jury, and because the Court also erred at the conclusion of all the testimony in refusing to discharge the jury and continue the case upon motion of the defendant.

(8) Because the Court erred to the prejudice of the defendant in permitting the plaintiff to sit in the Court room during the trial with her afflicted child upon her lap and to carry said child to the witness stand with her and keep the same in her lap during all the course of her testimony in the presence of the jury, and to the prejudice of the defendant and over its objection.

225 (9) Because the Court erred in giving to the jury instructions Nos. 1, 2, 3, 4, 5, and 6 and seven (7), all and each of which are not in conformity to, but in violation of the terms and provisions of the act of Congress of April 22, 1908, commonly known as the Employers' Liability Act, and in refusing, on motion of defendant, to give to the jury instructions mark- A, B, C and D, all and each of which are in conformity to the said act of Congress, commonly known as the Employers' Liability Act; and further erred in permitting testimony to be heard by the jury over defendant's objection, as to the condition, situation and ages of intestate's children, and the affliction and idiocy of the plaintiff's third child, for the purpose of magnifying the damages sued for, in violation of the terms and provisions of said act of Congress of April 22, 1908; and further erred in overruling defendant's motion to require the plaintiff to make her petition more specific and definite and to set out what act or acts of negligence were complained of, and the bases of the damages sued for as required by the uses and practices and rules prevailing in the Federal Court of the United States, in conformity to the terms and provisions of said act of Congress of April 27th, 1908; and because the Court erred in overruling, at the conclusion of plaintiff's testimony and again at the conclusion

of all the testimony, to peremptorily instruct the jury to find a verdict for the defendant, because, under such evidence, no right of action existed against defendant according to the terms and provisions of said act of Congress of April 22, 1908.

226 Defendant states further that by reason of such errors above complained of, the defendant has been deprived of the benefit of those provisions of the Constitution of the United States set out in Articles V and XIV of the amendments to said constitution, and it has thereby been deprived of property without due process of law, in violation of Article V of said Amendment, and it has further been deprived of property without due process of law, and denied the equal protection of the laws, in violation of Article XIV, section 1, of said amendment- to the Constitution of the United States.

(10) Because the alleged verdict returned by the jury is not a proper or valid verdict, because same is indefinite and uncertain in meaning, and not in any form required by law or the instructions of the Court.

(11) Because the judgment of this Court rendered upon said verdict is not in conformity to said verdict, and is contrary to law, and of said Act of Congress above set out.

Wherefore defendant prays for a new trial herein, and for all proper relief.

SIMS & RODES,
Att'ys P. D.

The following is a copy of an order entered in open court on the 13 day of June, 1914:

Warren Circuit Court.

WM. H. STEWART'S ADM'R'X
v.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Order.

227 This cause having been submitted upon plaintiff's motion and grounds for a new trial and at the same time upon the defendant's motion and grounds for new trial, *and* the Court being advised, adjudges and orders that the plaintiff's motion — and the same is now overruled, to which ruling of the Court the plaintiff excepts and prays an appeal to the Court of Appeals of Kentucky, which is granted, and she is now given, by consent of parties, until the 10th day of the next October term of this Court in which to tender and offer to file her bill of exceptions herein, and the transcript of the testimony.

It is further adjudged and ordered that defendant's motion for a new trial be and the same is now overruled, to which ruling of the Court defendant excepts and prays an Appeal to the Court of Appeals of Kentucky, which is granted, and the defendant is given by

consent of parties until the 10th day of the next October term of this Court in which to tender and offer to file its bill of exceptions herein, together with a transcript of the testimony, and the official stenographer of the Court is hereby directed to make out a true copy of all the testimony taken by her in shorthand, as required by law, and to lodge same with the papers of the case on or before the 10th day of the next civil term of this court.

The following is a copy of an order entered in open court on the 20 day of October, 1914:

Warren Circuit Court.

WM. H. STEWART'S ADM'R'X
v.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Order.

228 On this the second day of the October term of the Warren circuit court, came the defendant in the above styled case, the Louisville & Nashville Railroad Company, and tendered and offered to file its Bill of Exceptions herein, together with the official stenographer's transcript of the testimony, which was ordered to be marked "tendered" by the Clerk as of this day, and there not being time to consider the same, it was taken under advisement by the court for examination and approval.

The following is a copy of an order entered in open Court on the 28 day of October, 1914:

Warren Circuit Court.

W. H. STEWART'S ADM'R'X
v.
L. & N. R. R. Co.

Order.

Came plaintiff and in open Court, tendered her bill of exceptions and offered to file same, and the Court took same for examination, approval and filing.

The following is a copy of an order entered in open Court on the 2nd day of November, 1914:

Warren Circuit Court.

W. H. STEWART'S ADM'R'X
v.
L. & N. R. R. Co.

Order.

The defendant having tendered heretofore its bill of exceptions, and the transcript of testimony in duplicate, marked X, and the same having been taken under advice by the Court, and after
229 having been examined, is now signed and approved, and is ordered to be, and is made a part of the record, without being spread on the order book.

WM. H. STEWART'S ADM'R'X
v.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Bill of Exceptions.

Be it remembered, that on the trial of this case at the May term, 1914, of the Warren circuit court, before the Hon. McKenzie Moss, Judge, and the Jury, the evidence was taken by Mrs. Belle Galloway, official stenographer of this court, and her transcript of the evidence, together with the objections and exceptions therein, both as to the competency of witnesses and testimony, certified to by her and approved by the Judge of the Court, is made a part of this bill of exceptions the same as if copied herein in full. Said official stenographer's transcript of the evidence contained all the evidence introduced and heard and offered to be introduced and rejected, as well as all papers and exhibits offered and used or rejected as evidence on the trial of the above-styled cause, as well as all objections made, rulings had, exceptions taken and avowals made, and said transcript of the evidence is filed herewith as part hereof in duplicate, and for identification is marked X. Be it further remembered, that at the conclusion of plaintiff's testimony and again at the conclusion of all the testimony, the defendant moved the Court to
230 instruct the jury peremptorily to find a verdict for the defendant, which motions and each of them the Court overruled, and to which ruling of the Court defendant excepted at the time and still excepts. Be it further remembered, that at the conclusion of all the testimony in the case, the Court on its own motion, gave to the Jury instructions Nos. 1, 2, 3, 4, 5, 6 and 7, which are as follows, to-wit:

#1. "If the Jury believe from the evidence that on the occasion in controversy, the defendant's agents and employees in charge of its train, or any of them did with negligence operate and manage the train upon which plaintiff's intestate was serving as engineer,

so as to cause him to fall against the cab or engine, and injure him, and that he died as the natural and proximate result of said negligence, if any, they will find for the plaintiff."

#2. "If the jury find for the plaintiff, the measure of damages is such a sum as they may believe from the evidence will fairly and reasonably compensate the widow and the three children of plaintiff's intestate, for such pecuniary benefits as they may believe from the evidence they had a reasonable expectation of receiving from the decedent, if his death had not been caused by the negligence of the defendant, if it was so caused; and if they find for plaintiff, they will apportion their finding amongst the widow and three children, and state in their verdict how much, if anything, they find for each of them, the whole of the recovery not to exceed the amount sued for, to-wit: $35,000.00. And in estimating the damages, if they find for the plaintiff, the jury will consider the proof as to decedent's habits of industry and sobriety, only as affecting his power to earn money."

231 #3. "The Court instructs the jury that under the rules of defendant company, it was the duty of the flagman, O. L. Hill, to apply the emergency air brake by the use of the angle cock on the rear of the train, only when necessary to avoid injury to life or property; and, if they believe from the evidence that at the time said Hill applied said emergency air brake, it was not necessary, nor believed by the flagman to be necessary in the exercise of a reasonable judgment in the prudent and careful operation of the train, to apply said emergency air brake, to avoid injury to life or property; and shall further believe from the evidence that plaintiff's intestate received the injury which resulted in his death, as the direct and proximate result of the application — said emergency air brake, then they should find for plaintiff."

#4. "The Court instructs the jury that in the operation of defendant's trains it was the duty of plaintiff's intestate as engineer to exercise ordinary care for his own safety, and if he failed to exercise such care and his own negligence contributed in any way to produce the injuries, if any, complained of in the petition, then to the amount of such negligence, if any, attributable to said Stewart, the jury shall diminish the damages, if any, which may be found by them, if any at all, under these instructions."

#5. "The Court instructs the jury that when the plaintiff's intestate entered the service of defendant company as engineer, he assumed all the ordinary risks and hazards incident to that employment; and if the jury further believe from the evidence that flagman O. L. Hill stopped said train by the use of the air valve

232 in the rear of the caboose, when it was necessary so to do, or when said flagman believed in the exercise of a reasonable judgment, in the prudent and careful operation of said train it was necessary so to do, in order to avoid injury to property; and further believe that such stoppage of said train naturally and proximately resulted in the injury, if any, to said Stewart, complained of in the petition, then the law is for the defendant and the jury shall so find; unless, however, they shall further believe from the evi-

dence that the necessity, if any, for the application of said emergency air brake, had been brought about by defendant's agents or servants, in the negligent operation of said train prior to the application of said brake, in which event they will find for plaintiff."

#6. "The Court further instructs the jury that by negligence as used in the instruction is meant the failure to use such care as a person of ordinary prudence would exercise under the same or similar circumstances."

#7. "Nine of the jury may find a verdict, but if less than the entire jury agree, then those who do agree must sign the verdict."

To the giving of these instructions and each of them the defendant objected, but the Court overruled defendant's objection and gave said instructions to the jury, to which ruling of the Court defendant excepted at the time and still excepts.

Be it further remembered, that at the conclusion of the testimony the defendant moved the Court to give to the Jury instructions marked "A," "B," "C," and "D," which are as follows, to-wit:

233 "A." "The Court instructs the jury that the flagman Hill in stopping the train at the time and place shown in the evidence was not negligent, and the plaintiff can recover nothing in this case by reason of the act or acts of said flagman."

"B." "Unless the jury believe from the preponderance of the evidence as predicated in instructions of the Court, they shall find a verdict for the defendant."

"C." "The Court instructs the jury that if they should find against defendant all of the jury must agree to said verdict."

"D." "The Court instructs the jury that if they should find a verdict in favor of the plaintiff and apportion anything for the benefit of Mrs. Jeanette Stewart, the widow of W. H. Stewart, deceased, then they shall credit whatever sum they may so find, if any, by the sum of $5,000, amount of insurance collected by her upon his life."

The plaintiff objected to the giving of these instructions and each of them and her objection was sustained, and said instructions and each of them refused by the Court. To the rulings of the Court in refusing to give said instructions and each of them this defendant excepted at the time and still excepts.

Be it further remembered, that at the conclusion of the testimony the plaintiff moved the Court to give to the Jury instructions marked "P 1," "P 2," "P 3" and "P 4," which are as follows, to-wit:

234 "P 1." "The Court instructs the jury that if they believe from the evidence that on the occasion in controversy the defendant's agents and employees in charge of its train, or any of them, did with negligence operate and manage the train upon which plaintiff's intestate, W. H. Stewart was serving as engineer, so as to cause him to fall against the cab or engine and that he died as a natural and proximate result of said negligence, they shall find for plaintiff such a sum as will fairly compensate the surviving widow and his three infant children for his death, if it occurred wholly or in part from the negligence of any of the

servants or agents of defendant as aforesaid, not to exceed the sum of thirty five thousand dollars."

"P 2." "The Court further instructs the jury that if they believe from the evidence that plaintiff should recover for the negligence of defendant's agents and servants as set out in instructions No. 1, if any, and further believe from the evidence that said Stewart was himself negligent, and but for his own contributory negligence he would not have been hurt, then the jury may reduce the amount of plaintiff's recovery in proportion to the amount of negligence attributable to said Stewart."

"P 3." "The Court further instructs the jury that if they believe from the evidence that an emergency existed but the use of the emergency application was not necessary nor believed to be necessary by the flagman in the exercise of a reasonable judgment in the prudent and careful operation of the train for the purpose of preventing an injury to the property of defendant as set out in instruction No. 1."

235 "P 4." "The Court further instructs the jury that plaintiff's intestate in entering the service of defendant assumed only such risks as are usual and necessary in the prudent and careful operation of the train and unless they believe from the evidence that defendant'- agents and servants were managing said train prudently and carefully at the time the emergency was applied, or if they believe from the evidence that there would have been no necessity for the use of the emergency but for the preceding negligence, if any, of the defendant's agents or any of them, they should find for plaintiff as set out in instruction No. 1."

To the giving of these instructions and each of them, the defendant objected and the Court sustained its objection and declined to give said instructions or any of them. To the ruling of the Court in refusing to give said instructions or any of them plaintiff excepted at the time and still excepts.

The above instructions as set out herein are all the instructions that were offered, given or refused in the trial of this case.

Be it further remembered that the plaintiff testified for herself upon the trial of the case and when she took the witness stand carried her youngest child with her, and said child sat upon the witness' lap in the immediate presence of the jury during her entire testimony. Said child was afflicted in mind, which was exhibited in the face of said child, which made grimaces in the presence of the jury as it sat upon its mother's lap. To the carrying of said child to the witness stand and keeping it upon the lap of the mother the defendant objected, but the Court overruled its objection, to which ruling of the Court the defendant excepted at the time and still excepts; whereupon, because of the introduction and

236 exposure of said child, at the conclusion of the examination of plaintiff in chief by her counsel before the jury the defendant moved the Court to discharge the jury, and again moved the Court at the conclusion of all the testimony in the case to discharge the jury and continue the case, but the Court overruled

each of said motions, to which ruling of the Court the defendant excepted at the time and still excepts.

The jury having returned a verdict for the plaintiff and judgment having been rendered thereon, defendant filed written grounds and moved the Court to vacate and set aside said judgment and grant it a new trial, which motion and grounds were ov-rruled, to which ruling defendant excepted at the time and still excepts, and prayed an appeal to the Court of Appeals, which was granted. Now comes this defendant and tenders this bill of exceptions and also the transcript in duplicate of the official stenographer's transcript of the evidence and on its motion said bill of exceptions is examined, signed, attested and approved by the Court, and said transcript of the evidence is examined, signed, attested and approved by the Judge; and it is now ordered that they be filed and made a part of the record without being spread on the order book, and it is now certified that this bill of exceptions, with said transcript of the evidence, contains all the evidence in this case, and is true and correct in every particular.

Attested and approved:

McKENZIE MOSS,
Judge of the Warren Circuit Court.

237 The following is a copy of an order entered in open court on the 3 day of November, 1914:

Warren Circuit Court.

W. H. STEWART'S ADM'R'-
v.
L. & N. R. R. Co.

Order.

The bill of exceptions heretofore tendered herein by the plaintiff and taken under advisement by the Court having been examined by the Court, is now approved, signed and ordered to be and is made a part of the record, without being spread upon the order book.

The following is a copy of the bill of exceptions tendered in open Court on the 28 day of October, 1914, and filed on the 3 day of November, 1914:

Warren Circuit Court.

W. H. STEWART'S ADM'R'X.
v.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Bill of Exceptions for Plaintiff.

Be it remembered, that on the trial of this *term* at the May term, 1914, the Court gave to the jury instructions 1, 2, 3, 4, 5and 6, all

of which are fully set forth in the bill of exceptions tendered by defendant October 17, 1914, and the Court refused to give to the jury instructions P. 1, P. 2, P. 3, and P. 4. Plaintiff objected and excepted to the instructions given by the Court, and excepted to the ruling of the Court in refusing to give the four instructions offered in her behalf as aforesaid.

238 Be it further remembered, that on the trial of said cause plaintiff asked to read in evidence the deposition of O. L. Hill filed in this cause, and which is copied into the transcript filed in this cause on a former appeal. The Court refused to permit the plaintiff to read the deposition of O. L. Hill upon the ground that O. L. Hill was then present as a witness for defendant, to which plaintiff objected and excepted, and the deposition as copied in the transcript filed on appeal is referred to as part of this bill of exceptions.

Be it further remembered, that plaintiff asked to read in evidence on said trial from the revised rules for governing transportation in force at the time by the defendant railroad, rules 44, 69 and 119. The court refused to permit any of the said rules to be read to the jury, to which ruling plaintiff objected and excepted, and said rules are as follows:

"44. Three short blasts of the whistle, when the train is standing (to be repeated until answered as provided in rule 61) is a signal that the train will back (thus — — —).

"69. The engine-bell must ring before starting a train, and when running through tunnels and the streets of towns or cities."

"119. No train shall leave a station without a signal from its conductor."

Be it remembered, that on the trial of said cause the Court permitted defendant to prove that plaintiff collected life insurance payable to herself after her husband's death to the amount of $5,000, to which plaintiff objected and excepted.

239 Be it further remembered, that plaintiff moved that a new trial be granted her, because the verdict of the jury did not allow her enough damages, and the damages were too small to compensate her and the estate for the death of her said husband. The Court overruled the motion, to which plaintiff objected and excepted.

Plaintiff asks that this her bill of exceptions be examined and approved by the Court and filed as part of the record herein.

All instructions asked, refused or given by the Court are set forth in the bill of exceptions tendered by defendant in this cause.

Examined and approved.

McKENZIE MOSS,
Judge Warren Circuit Court.

The following is a copy of the supersedeas bond executed in office on the 19 day of June, 1914:

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
against
W. H. STEWART'S ADM'R'X, Appellee.

Supersedeas Bond.

Upon an Appeal from a Judgment of the Warren Circuit Court,
Rendered 28 Day of May, 1914.

Whereas, said appellant, Louisville & Nashville Railroad Company, — an appeal from the judgment of the Warren circuit court, rendered at its May term, 1914, against it in favor of the appellee, for the sum of eleven thousand eight hundred and eighty five — ($11,885.00) and the appellant desires to supersede the judgment above mentioned;

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Now, we, Citizens Trust & Guaranty Company of West Virginia, surety, do hereby covenant to and with the appellee, Jeanette Stewart, administratrix of W. H. Stewart, deceased, that the appellant will pay to the appellee all costs and damages that may be adjudged against the appellant on the appeal, and also that they will satisfy and perform the judgment above stated, in the event that it should be affirmed, and any judgment or order which the Court of Appeals may render or order to be rendered by the inferior Court, not exceeding in amount or value the judgment aforesaid.

Witness our hands, this 19 day of June, 1914.

CITIZENS GUARANTY & TRUST CO.
OF WEST VIRGINIA,
By JAMES C. SIMS, *Att'y in Fact.*

The following is a copy of the power of attorney filed in office June 19, 1914, and attached to said bond:

Citizens Trust & Guaranty Company, of West Virginia, a corporation organized under the laws of the State of West Virginia, with its principal office at Parkersburg, West Virginia, and duly licensed and authorized to become surety on bonds within the Commonwealth of Kentucky, hereby makes, constitutes and appoints James C. Sims or John B. Rodes, of Bowling Green, Kentucky, its true and lawful attorney for it and in its name to sign, seal and deliver

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a certain supersedeas bond for the Louisville & Nashville Railroad Company, to be given in the Warren Circuit Court in the case of Wm. H. Stewart's Adm'r'x vs. Louisville & Nashville Railroad Company, hereby ratifying and confirming all and singular the actions of the said attorney in fact in and about the execution and delivery of said bond, to all intents and purposes the same as if said bond had been executed by the proper officers of the said Guaranty Company at its home office. This power of attorney to be attached to or filed with said bond when so executed.

In testimony whereof, the said Guaranty Company has caused its corporate name to be signed hereto, and its corporate seal to be

affixed hereto and attested, by its proper officers thereunto duly authorized, this 13th day of Nov., 1914.

[SEAL.] CITIZENS TRUST & GUARANTY COMPANY OF WEST VIRGINIA,
By W. G. PETERKIN, *President.*

Attest:
J. H. KNAPP, *Secretary.*

STATE OF WEST VIRGINIA,
Wood County, To-wit:

I, J. L. Knapp, a Notary Public in and for said County, do certify that W. G. Peterkin personally appeared before me in my said County, and being by me duly sworn, did depose and say that he is president of Citizens Trust & Guaranty Company, of West Virginia, the corporation described in the writing above, bearing date the 13th day of May, 1914, authorized by said corporation to execute and acknowledge deeds and other writings of said corporation, and that said writing was signed and sealed by him in behalf of said corporation, by its authority duly given. And the
241 said W. G. Peterkin acknowledged the said writing to be the act and deed of said corporation.

Given under my hand and official seal, this 13th day of May, 1914.

[SEAL.] J. L. KNAPP,
Notary Public.

My commission expires August 29, 1917.

The following is a copy of the supersedeas issued on said bond:

THE COMMONWEALTH OF KENTUCKY:

Warren Circuit Court.

L. & N. R. R. Co., Appellant,
against
W. H. STEWART'S ADM'R'X, Appellee.

Supersedeas.

I do certify that an appeal has been granted from this Court *for* a judgment obtained by Jeanette Stewart, administratrix of W. H. Stewart, deceased, against Louisville & Nashville Railroad Company for $11,885.00, in the Warren Circuit Court, at its May term, 1914, and that a supersedeas bond has been executed as required by section 749, Codes of Practice.

Therefore the appellee and all others are commanded to stay proceedings on the judgment above recited.

Witness, my hand as Clerk of said Court, this 19th day of June, 1914.

O. A. ROUP, *C. W. C. C.*,
By S. C. LAWSON, *D. C.*

The following return is indorsed thereon: Executed on W. H. Stuard's Adm'r'x by delivering a copy of the within supersedeas to her. June 19, 1914. John C. Ray, S. W. C. By C. D. Venable, D. S.

242 & 243 TRANSCRIPT OF TESTIMONY.

Mrs. W. H. STEWART, Adm'x, &c., Plaintiff,
vs.
L. & N. R. R. Co., Defendant.

Filed Dec. 8, 1914. Robt. L. Greene, C. C. A.

244 TRANSCRIPT OF TESTIMONY.

Warren Circuit Court, May Term, 1914.

W. H. STEWART'S ADM'X, Paintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant

Be it remembered that upon the trial of the above styled cause in the Warren Circuit Court, the following oral testimony was introduced.

Testimony of Mrs. W. H. Stewart.

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. Are you the widow of W. H. Stewart?
A. Yes sir.
Q. What is your name, given name?
A. Mrs. Janette Stewart.
Q. Where were you raised?
A. In Bowling Green.
Q. Where was W. H. Stewart raised?
245 A. In Bowling Green.
Q. When did he die?
A. On September 27th, 1908.
Q. Where did he live at the time?
A. In Bowling Green.
Q. Were you thereafter appointed Administratrix of his estate?
A. Yes sir.

(Proof as to administration is waived.)

Q. How old was W. H. Stewart at the time of his death?
A. Thirty-four.
Q. What was his occupation at the time?
A. Engineer.
Q. How long had he been engineer?
A. I don't know, but I expect about three years.

Q. What year were you married?
A. In 1902.
Q. What time in 1902?
A. In May 1902. May 28th 1902.
Q. What other positions did he ever hold with the L. & N. Railroad Company?
A. He filled a good many. He was fireman, caller, and hostler.
Q. How long had he been working for the Railroad Company?
A. Ever since he was about seventeen or eighteen.
246 Q. He first worked as call boy?
A. Yes sir.
Q. How long had you been acquainted with him prior to his marriage?
A. Ever since I was about ten years old.
Q. Knew him ever since he was a call boy?
A. Yes sir.
Q. When was your first child born?
A. March 10th 1903.
Q. What is his name?
A. James Theodore.
Q. The second?
A. Born March 31st 1905.
Q. What is its name?
A. William Albert Stewart.
Q. When was your third child born?
A. December 9th 1907.
Q. What is its name?
A. Christine Stewart.
Q. Where is your oldest child?
A. In the Court room.
Q. What is his name?
A. James Theodore.
Q. Where is your second child?
A. He is at church now. Had to go for instructions this
247 morning.
Q. Where is your other child, the girl?
A. I have her here in my lap.
Q. Tell the jury what was the cause of the death of W. H. Stewart?

(Objection by Att'ys for Def't. Objection sustained.)
The Court: "She can state what was the matter with him, and how he appeared; she can state what appeared to be his condition."

Q. You say your husband died September 27th, 1908?
A. Yes sir.
Q. What was his condition immediately prior to his death, and if he was suffering from any disease or injury tell the jury what it was?

(Objection by Att'ys for Def't. Objection sustained.)
The Court: "Let her describe his condition and appearance to the jury."

A. From the time that he came in complaining?

The Court: "She can tell how he appeared and his condition but she can not tell what he said."

Q. What he complained of?

The Court: "I think not. Not what he said to her."

248 Mr. Procter: "Not what he said, she can not as I understand repeat any conversation, but the fact that he complained."

The Court: "That would be a conversation."

Q. Where was your husband Sept. 5th, 1908?
A. He came in off the road.
Q. What time did he get home?
A. Sometime in the afternoon, I don't know exactly the hour.
Q. What was his condition when he came home?
A. He was complaining.

(Objection by Att'ys for Def't overruled, to which Att'ys for Def't except.)

Q. How was he complaining, the Court instructs you not to tell his words, but if he was complaining of anything tell what it was?

(Objection sustained.)

Q. What was he complaining of, not what he said?

(Objection by Att'ys for Def't. Objection overruled, to which Att'ys for Def't except.)

The Court: "Of what hurt him, she might state that."

A. His head and shoulder were hurting him.

249 (Objection to the above answer by Att'ys for Def't. Obj. overruled, to which Att'ys for Def't except.)

Q. That was on September 5th. Now on September 6th what was his condition?
A. He was still complaining and went up to see the doctor.
Q. What doctor?
A. Dr. Stone.
Q. From September 6th where was he, did he go out any more?
A. I think he went out on the 8th.
Q. What was his condition when he went out on the 8th?
A. Still complaining.
Q. Complaining of what?
A. His head and shoulder.

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

Q. Did he prior to Sept. 5th ever complain of anything hurting him, his head and shoulder?
A. No sir.
Q. Now September 8th he went out on his run?
A. Yes sir.

Q. Did he report for service, or was he called for the run?
A. He was called for it, they were short of men.
Q. Then when did he return?
250 A. I don't remember, I think he made some turn arounds before he came back.
Q. Where was the turning around point?
A. Guthrie.
Q. What was his condition from September 5th until his paralysis?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. He was always complaining from the time he came in on September 5th until he came in and was paralyzed.
Q. What was his appearance?
A. He seemed to be suffering.
Q. Where was it, was he paralyzed at any time?
A. Yes sir.
Q. When did that paralysis begin to appear on him?
A. On Tuesday before he died on Sunday. Tuesday morning when he got up when he was eating his breakfast.
Q. What day did he come in from his run prior to Tuesday?
A. I don't know but I think it was about the 20th, it was on Friday before he was paralyzed on Tuesday.
Q. Where was he when he was paralyzed on Tuesday?
A. At home.
Q. What was his condition?
A. Complaining.
Q. Complaining of what?

251 (Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. His head and shoulder.
Q. On Tuesday, was that the 23d, do you remember the day of the month?
A. Yes sir I think it was the 23d.
Q. Anyhow it was on Tuesday before the Sunday following?
A. Yes sir and that was the 27th.
Q. How was he affected?
A. It came on gradually, affected his tongue first.
Q. Was any doctor with him on the 23d?
A. I think he saw the doctor but I am not positive.
Q. Who was your family doctor at that time?
A. Dr. Stone.
Q. Now what was his condition on the 24th?
A. He was still complaining of his head and shoulder.
Q. Did that paralysis get worse or better?
A. Got worse.
Q. Did he get speechless, or was he able to speak up to the time of his death?

A. He got speechless on Tuesday evening before he died Sunday.
Q. Was he able to speak at all from Tuesday until Sunday?
A. No sir.
Q. When was he confined to his bed from that illness for
252 the first time?
A. On Tuesday.
Q. From Tuesday then until he died he was confined to his bed?
A. Yes sir.
Q. What was the condition of his health prior to September 1908?
A. It was good.
Q. You had been married to him six years then?
A. Yes sir.
Q. What sickness had he had from the time of your marriage until he came in on September 5th 1908 and was complaining?
A. He had one sick spell.
Q. When was that?
A. In the spring before he died in September.
Q. What sort of a man was he as to his habits?
A. His habits were good.

The Court: "Whether industrious or not, she can state."

Q. Did he have any bad habits?

The Court: "What were his habits?"
Mr. Procter: "His habits were good."
(Obj. by Att'ys for Def't to the Att'y for Pl'ff stating the answer to the question. Objection sustained.)

253 Q. Was he a member of any church?

(Objection sustained.)
Att'y for Pl'ff makes the following avowal: "We expect the witness to state that he was a member of the First Baptist Church."
Q. What were his habits for morality?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. They were good.
Q. What were his habits for industry?
A. Good.
Q. What were his habits for economy?
A. They were good.
Q. What was his manner and what was the character of his attention towards yourself and your children?

(Objection sustained.)

Q. What was the character of his attention towards you and your children?

(Objection sustained.)
Att'y for Pl'ff makes the following avowal: "We expect the wit-

ness to state that his manner and attention to herself and her children was good, and affectionate to her and his children."

Q. When he was off of his run and at home, what degree of
254 assistance, if any, did he give you in looking after your children?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. He helped me as much as he could when off of his run, and was affectionate to me and the children.

Q. What salary was he earning at the time?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. From $135 to $160 a month.

Q. Was that the average?

(Objection by Att'ys for Def't. Objection overruled; to which Att'ys for Def't except.)

A. Yes sir.

Q. Do you mean $135 or $160 a month, or how?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. Per month.

Q. What did he do with his salary?

255 A. He brought it to me and gave it to me.

Q. For what purpose?

(Objection by Att'ys for Def't. Objection overruled; to which Att'ys for Def't except.)

A. For the support of his family.

Q. Did you or his family have any other means of support except his wages?

A. No sir.

(Objection by Att'ys for Def't. Objection overruled; to which Att'ys for Def't except.)

Q. Did he have any property at the time of his death?

A. No sir.

Q. Did you have any children old enough to go to school?

A. No sir.

Q. Have you any of the children in school now?

A. Two.

(Objection by Att'ys for Def't. Objection overruled; to which Att'ys for Def't except.)

Q. What is the mental and physical condition of those children?

256 (Objection by Att'ys for Def't.)

The Court: "As governing the amount of recovery, if any-

thing, the Court does not regard the question as important, but as the jury is required to find for each beneficiary, and to proportion the finding, if they find anything, the jury is entitled to know the condition of the children."

(To the above ruling of the Court, the Att'ys for Def't except.)

A. The two boys are healthy, and their mental condition is good, but the little girl is not.

Q. What is the condition of the mind of that youngest child, the little girl?

(Objection by Att'ys for Def't. Objection overruled; to which Att'ys for Def't except.)

A. I can't tell you exactly what you would call it, she is not like she ought to be, she can't talk yet and she is past six years old.

Q. How old was she before she could walk?

A. She was past four.

Q. Can she walk well now?

A. Yes, she can walk well now.

257 Q. She can talk?

A. No sir.

Q. Has she any intelligence, can she learn anything?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. She can learn a little but forgets it in a little time, nothing holds to her at all.

Q. What degree of care does she require of you?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. She requires all of my attention, I have to watch after her all the time.

Q. Why do you have to watch after her?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. Her mind is not strong enough to control herself, I have to watch her all the time. I have to keep her locked in the yard or the house, she has got to be in my sight all the time.

258 (Cross-examination by Jas. C. Sims, Att'y for Def't:)

Q. Your husband made a number of trips on the railroad as engineer from the 5th of September until the 20th of September?

A. Yes sir.

Q. Made his usual trips and run did he not?

A. Yes sir.

Q. He was not taken to his bed until the 23d day of September 1908, on Tuesday?

A. No sir. It was on Tuesday.

Q. And he died on the following Sunday, the 27th of September 1908?

A. Yes sir.
Q. He was out on the road a good part of the time after you were married?
A. Well, I think they all are.
Q. Well I say he was, was he not?
A. Yes sir.
Q. More than half of his time wasn't he?
A. I expect so.
Q. Isn't that your judgment that he was out on the road more than half of his time?
A. Well it was according to the business.
Q. But that was his usual habit, being away from home more than half of his time on the road?
259 A. He went when he was called, yes sir.
Q. His compensation depended entirely upon the runs he made?
A. Yes sir.
Q. You know where his runs were, his runs were from where to where?
A. He run from Bowling Green to Paris and from Paris to Guthrie and back to Paris and then through to Bowling Green.
Q. Now the run from Bowling Green to Paris usually kept him away from home how long each trip?
A. Well I don't remember, he was generally away two days anyhow.
Q. In making the run from Bowling Green to Paris, and from Paris back to Guthrie and the turn around from Guthrie back to Paris, how long would he be out on the turn around trips?
A. If he just made one, maybe he would get in the third day, but sometimes he would make two before he would ever come back to Bowling Green.
Q. How long would that keep him away from home?
A. I have known him to leave the first of the week and not get home until Thursday night or Friday morning.
Q. When away from home did he have a boarding place in Paris?
A. He did.
Q. Do you know where?
A. Well I expect on his runs he had more than one boarding house, he was boarding at Mrs. Booth's boarding house.
260 Q. He also boarded some in Gunthrie did he not?
A. He didn't have any room there, I guess he eat his meals there, but the place he had a room was in Paris, Tennessee.
Q. And when not in his boarding house and away from home he would get his meals wherever he happened to be?
A. Yes sir.
Q. How much insurance did you collect on his life?

(Objection by Att'ys for Pl'ff. Obj. overruled; to which Att'ys for Pl'ff excepts.)

A. Something over $5,000.
Q. How much over $5,000?

A. I can't tell you the exact amount without going into details.
Q. Isn't it true that you collected $5,000 on one policy?
A. No sir.
Q. What companies did you collect from?
A. The accident policy and the Engineers.
Q. How much from the Accident Policy?
A. $2,000.
Q. How much from the B. of L. E., Brotherhood of Locomotive Engineers?
A. $1500.
Q. What other insurance did you collect?
A. He had a policy in the New York Life.
Q. For how much?
261 A. That is the policy that I can't remember how much I collected from it, he hadn't been in that long, and I just collected a certain per cent of it.
Q. Have you no idea how much it was for?
A. No, I don't, I collected something over $1,000, but I can't tell you the exact amount.
Q. Is that all the insurance you collected?
A. That is all, yes sir.
Q. After your marriage to Mr. Stewart who lived in the family with you?
A. His mother.
Q. All the time?
A. Yes sir.
Q. Did he support her?
A. Yes sir, all but the property she owned, we lived in the house, she owned the property where we lived and we lived in the house with her.
Q. She was living at the time of his death?
A. Yes sir.
Q. Where is she now?
A. She is dead.
Q. She was dependent upon him for a support outside of you living in her house?
A. Yes sir.
Q. When did his mother die?
A. June 17th last year.
262 Q. 1913?
A. 1913, yes.
Q. What was her name?
A. Sarah A. Sherrell.
Q. What was your maiden name before you were married?
A. Janette Sands.
Q. When was your husband born?
A. March 9th 1874.
Q. You say that your husband owned no property at the time of his death. How long had he been running in the capacity of an engineer?
A. Something like three years I think.

Q. What position did he occupy with the Railroad Company prior to becoming an engineer?
A. Fireman.
Q. How long was he a fireman?
A. I expect you know more about that than I do, I expect seven or eight years, something like that.
Q. He earned more as an engineer than he did as a fireman did he not?
A. Yes sir.
Q. Do you know about how much more?
A. No, I don't.
Q. Do you know how much he earned as a fireman?
A. From about $75 to $85 a month, I can't remember.

Q. The little girl you spoke of in answer to Mr. Procter
263 as to the condition of her mind, you now have in your lap?
A. Yes sir.

Q. You have had that little girl in your lap all the time you have been testifying?
A. Yes sir.
Q. When you went upon the stand you took that little girl with you and had her on your lap then?
A. Yes sir.

(Redirect examination by B. F. Procter, Att'y for Pl'ff:)

Q. Why did you have the little girl in your lap?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. I had to bring her with me, I had no one to leave her with.
Q. Why did you have her in your lap when you were testifying?
A. I had to bring her with me, I don't know why I brought her in my lap, Iguess the little boy could have kept her.
Q. How far from you?
A. I don't know.
Q. In your immediate presence?
A. Oh, she is in my presence, yes sir.
Q. You spoke of Mr. Stewart contributing to the support of his mother, Mrs. Stewart, did Mrs. Stewart do any service in the family while living with you?

264 (Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. She helped me with the children.
Q. Did she earn any money of her own in any way?

(Objection by Att'ys for Def't. Objection overruled; to which Att'ys for Def't except.)

A. We did a little sewing together, I and her.
Q. Mrs. Stewart, who were those policies payable to?
A. To me.

(Recross-examination by Jas. C. Sims, Att'y for Def't:)

Q. The New York Life Policy, to whom was that made payable?
A. To me.
Q. Now the Accident Policy that you speak of?
A. It was payable to me.
Q. What Company was that in?
A. I can't tell you.
Q. The Brotherhood of Locomotive Engineers, how was that payable?
A. To me.
Q. Did you have the policies at the time of his death?
A. I had the policies, yes sir, all of them.
Q. Those policies you haven't now in your possession?
A. Why no, you have to turn them in.
265 Q. Are the children named in any of those policies?
A. No, sir.
Q. Is his mother named in any of those policies?
A. Yes sir.
Q. Which one?
A. In the Brotherhood of Locomotive Engineers.
Q. In any of the other policies?
A. No sir.

Testimony of James Theodore Stewart.

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. What is your age?
A. Eleven.
Q. Are you the son of W. H. Stewart?
A. Yes sir.
Q. How old were you when your father died?
A. About five years old.
Q. Do you remember him?
A. Yes sir.
Q. Do you remember when he died?
A. No sir.
Q. Do you remember when he was buried?
A. No sir I can't.
Q. Do you remember whether or not you were at the burying?
A. No sir.

266 Att'ys for Def't move to exclude the above testimony, which is sustained. And Att'y for Pl'ff excepts to the ruling of the Court.

Counsel for Defendant moves the Court to discharge the jury because of the exhibition of the idiotic child in the lap of the mother and in the presence of the jury and because of the appearance of the child, being that of a child without mind, tongue hanging out, and making faces in near proximity to the jury. Motion is overruled by the Court, to which Def't excepts.

Plaintiff offered to introduce the deposition of O. L. Hill, to which Defendant objected, and the Court ruled that O. L. Hill must be introduced in person, to which ruling Plaintiff excepted, whereupon the plaintiff called H. T. Jones and offered to read his deposition taken in the case, to which Defendant objected, and the Court sustained the objection and ruled that the witness must be examined orally, to which ruling Plaintiff excepted.

Testimony of H. T. Jones.

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. Where do you live?
A. I live here.
Q. How old are you?
267 A. Thirty-eight.
Q. What is your occupation?
A. Freight Conductor.
Q. How long have you held that position?
A. Since 1903.
Q. How long have you known W. H. Stewart?
A. Quite a number of years, ever since we were school boys together.
Q. Tell the jury what sort of man he was?

Objection by Att'ys for Def't. Objection overruled, to which Def't excepts.

The Court: "As to his habits of industry, sobriety, and economy."
A. My association with him was principally on the road, and he always struck me as being a sober and proper man for that kind of work.
Q. What sort of an engineer was he, what capacity did he have for an engineer?
A. He was a good engineer.
Q. How long have you been in the service of the Railroad Company?
A. Since January 8th, 1897.
Q. How long have you been running as freight conductor?
A. Since the summer of 1903.
Q. What is your run at present?
268 A. Chain gang, running both ways out of Paris, Tennessee.
Q. Does part of your run embrace from Paris to Bowling Green?
A. Yes sir.
Q. And thence South to what point?
A. To Memphis.
Q. How often does your duties bring you to Bowling Green?
A. Really I cannot say accurately.
Q. What was your run in September 1908?
A. Practically the same as it is now if I remember right, or it might have been strictly on this Division, I won't be sure.

Q. Paris is one of the terminals of your run, in the State of Tennessee?
A. Yes sir.
Q. Where were you on September 5th 1908?
A. On a North bound freight.
Q. What was the number of your train?
A. It seems that it was 114 if I remember right.
Q. Who was the engineer pulling you on that trip?
A. W. H. Stewart.
Q. Who was your crew?
A. O. L. Hill flagman, and W. C. Minor head brakeman.
Q. Who was on the engine?
A. Stewart, engineer, and Sorrells fireman.
Q. Do you remember taking the siding at Cumberland City to let Southbound passenger train pass, if so, what was the
269 number of that train?
A. 103.
Q. What was the movement of that train, W. H. Stewart's train, immediately preceding that injury?
A. After sawing 103 out it was necessary to back down to the South end of the siding to make room to clear the North end and at the same time to open the street and passenger crossings and while backing down the air was applied from the rear of the train.
Q. Did you have any conversation with Stewart, you were there present when that air was applied?
A. Yes sir.
Q. Was the train in motion when the air was applied?
A. Yes sir.
Q. Was it moving backward or forward?
A. Back.
Q. Who gave the signal to move back?
A. I did.
Q. You were the conductor in charge?
A. Yes sir.
Q. What position was Stewart in at the time?
A. At the right side of the engine at the cab window.
Q. Was he looking at you and receiving signals from you?
A. Yes sir.
Q. At the time the emergency was applied?
A. Yes sir.
270 Q. Was his head or any part of his body in or out of the window?
A. The best of my recollection his head was out of the window.
Q. Was he leaning in the window, was he touching the window sill?
A. Pollibly so, I can't be sure about that.
Q. But the best you remember his head was out of the cab?
A. Yes sir possibly leaning on the window sill.
Q. And looking out and taking signals from you?
A. Yes sir.
Q. Was that his proper position?

A. Yes sir.
Q. Was it his duty to be taking these signals from you as conductor?
A. Yes sir.
Q. Was it his duty to move in obedience to your signals?
A. Yes sir.
Q. Wasn't it his duty to move back until he got another signal?
A. If they was considered the proper signals he should, yes sir.
Q. After you gave the signal to back it was his duty to move in obedience to the signal until he got another signal?
A. Unless something prevented in the way of emergency.
Q. If he was stopped it was not his duty to move further?
A. If he should see a car derailed, or stock, or anything, it was his duty to stop, that is what I mean.
271 Q. While he was moving backward was he stopped in any way?
A. Yes sir.
Q. Did you give him a signal to stop?
A. No sir.
Q. How was he stopped then?
A. By the application of the air brakes from the rear of the train.
Q. Who did that?
A. O. L. Hill.
Q. What effect did the application of the air have?
A. It stopped the train.
Q. Stop it suddenly or gradually?
A. Suddenly.
Q. What effect did that have on the train?
A. A sort of jerking effect.
Q. You saw the cars stop when the emergency was applied?
A. Yes sir.
Q. Were you watching Stewart?
A. Watching him and the train at the same time.
Q. Do you know what effect it had on him?
A. No sir.
Q. On Sorrells the fireman?
A. No sir.
Q. Did you see him thrown against the side of the cab?
A. No sir.
Q. Did you immediately thereafter have a conversation with him about the effect on him?
272 A. No sir.

(Objection sustained.)

Q. After the emergency was applied what was next done?
A. We proceeded with the work like we started to do.
Q. What work?
A. Backing down and making room and cutting the crossings for passengers to pass.
Q. Had 103 passed?
A. No sir there was a freight train there ahead of 103.

Q. The freight had passed out?
A. It had passed but we had to saw them out you understand.
Q. That caused you to go into the side track, and you had to clear the upper end of the siding for 115. What was the length of that siding?
A. About 32 car lengths or possibly 34.
Q. Have you any books to show the length of that siding?
A. No books, but it may be shown by the Time Card.
Q. Have you the last Time Card with you?
A. No sir.
Q. How many cars did you have in your train?
A. Thirty-three or thirty-four to the best of my recollection.
Q. How many cars did you find on the siding when you got to Cumberland City?
273 A. I don't remember, there was some.
Q. What became of those cars?
A. We shoved them ahead of us as we went through the siding.
Q. Was there as many as three?
A. Possibly so, I can't be sure.
Q. There was more than one?
A. I won't be certain.
Q. As near as you can recollect?
A. You see we don't charge our memory with those things, because we don't consider them of any importnace, but there was some cars.
Q. And you pushed them out on the North main?
A. Yes sir.
Q. You had to do that because you had to let 115 out South, that was the freight?
A. Yes sir.

(Objection to question because leading. Objection overruled, to which Att'ys for Def't except.)

Q. After 115 had passed the next movement you made was to back to clear the North end, and that was when the emergency was applied?
A. Yes sir.
Q. Where was Minor at that time?
A. It seems to me that he was near the head end of the
274 train possibly at the switch or near the North switch.
Q. That is a straight track, isn't it?
A. No, there is a slight curve in the siding, and the curve is North of the North switch.
Q. That is where it leaves the main track?
A. No, at a point right near the passenger station there is a slight variation, it widens out and comes out to the main line again.
Q. The main line is straight there between the points of the siding isn't it?
A. Yes sir practically straight.

Q. At the time you were giving these signals where were you standing?

A. At a point near the end of the train within good range of vision, I don't remember how close.

Q. Do you mean at the end of your train?

A. I could see both ends.

Q. You could see the entire track?

A. The entire train, yes sir.

Q. Now Minor, when that train stopped there and fouled the main, did any person send Minor away?

A. I sent him away in time to protect against 103.

Q. Did you have a meeting order for 103?

A. No meeting order. I met them on Time Card schedule, it was as far as I could make.

Q. Under the Rules of the Company how long do you have to clear the main?

275 A. Five minutes.

Q. Did you have the full clearance time when you went in?

A. More than the clearance.

Q. Do you remember what time you got in at Cumberland City?

A. Plenty of time to let the freight train out and to let 103 by.

Q. Were you on schedule time at that time?

A. I don't know.

Q. Didn't your train run on a schedule?

A. It run on a schedule, but it could be several hours late, without losing its rights, freight trains don't always run on schedule time but may still be on their own schedule rights.

Q. Isn't it true that you got there about 9:25?

A. I think so.

Q. And the passenger train was due about 9:30?

A. 9:36.

Q. You had ample time to back in there and let the freight train out and back in and let 103 by, before 103 was due there?

A. Yes sir.

Q. How far did your train back before the emergency was applied, Hugh?

A. I couldn't state that accurately.

Q. About?

A. Possibly a car length, or maybe a car and a half, I can't say.

276 Q. What speed was it backing at, at that time, as much as two or three miles an hour?

A. Something like that.

Q. Had 103 arrived and was ready to go out before you commenced backing down?

A. No sir.

Q. How long until it arrived?

A. Several minutes.

Q. Was that the object in backing as you were doing at that time, so 103 could pass?
A. Yes sir.
Q. Were your cars at the North end, was the main track still fouled at the time this emergency was applied?
A. I can't state that accurately whether it was or not.
Q. Your best judgment?
A. Possibly it was, but not very much.
Q. But your best judgment is that you had not sufficiently cleared the North end for 103 to pass in safety there?

(Objection sustained.)

A. It may, or may not have been, I can not say.
Q. What is your best recollection?
A. Well, I don't remember.
Q. But you did have 33 or 34 cars in your train?
A. Yes sir.
Q. That is what you came into Cumberland City with?
277 A. Yes sir.
Q. Have you got a Time Card with you that will show the length of that siding?
A. No sir.
Q. Have you a Time Card that will show it?
A. I have it in my caboose.
Q. Haven't you one at home that will show it?
A. No sir.
Q. Has there been any changes made in that siding there?
A. I don't think there has, since that time.
Q. When was that change made in that siding *made*, Hugh?
A. I don't know, can't remember.
Q. Ten or twelve years ago?
A. I couldn't say.
Q. Is it the same now as it has been ever since you have been at work on the road?
A. No sir.
Q. How long have you been at work on the road?
A. Seventeen years.
Q. When was that change made in that siding?
A. I don't remember.
Q. Was it prior to 1902?
A. Mr. Scates can give you the data on that.
Q. Don't you know that that siding only cleared 18 cars according to your own statement?

(Objection sustained.)

278 Q. Here is a List of Stations, No. 530, Oct. 15, 1912. You say there has been no change made there since? Isn't that the List of Stations and names of Agents up to October 15, 1912, if so, look at that and tell the jury how many cars that siding will hold as shown there?

(Att'ys for Def't object to the introduction of the book contain-

ing the statement above referred to. Objection overruled; to which Att'ys for Def't except.)

Q. I now show you a book upon which it is printed "Louisville & Nashville Railroad Company. List of Stations and Names of Agents, No. 530, Oct. 15, 1912," examine that Mr. Jones, and see if that is a correct statement of the stations and of the clearance length of sidings in feet as issued by the L. & N. Railroad Company for the information of its Agents?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. These books are handed to us by our officials and are supposed to be correct. This shows Cumberland City with a clearance of 720 ft. Now the length of cars vary.

Q. That is estimated at 18 cars, isn't it?

A. Yes sir.

279 (Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

Q. How many cars is that estimated to hold?

A. It would depend on the length of the cars.

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

Q. How many cars on the Time Card?

A. The number of feet is divided by 40, just the length of each car, it would depend on your individual train as to how many cars, you can go into a siding at any time.

Q. Vary in what, length?

A. Owing to its capacity.

Q. What was the capacity of the cars on that occasion?

A. Possibly 60,000 lbs., and the average length is about 36 ft. possibly, that is the clearance length.

Q. Did that exclude drawheads and couplings?

A. Yes sir.

Q. How much space would each car take on the track?

A. That would depend upon whether they were drawn out or bunched in and the springs closed.

Q. How much difference would that make in the length of the clearance of a car?

A. In that length of train it would make 40 ft. possibly.

Q. That would be about 3 or 4 inches to the car?

280 A. That would be about 40 ft. to the 34 cars.

Q. That would be over a ft. to the car?

A. Yes.

Q. Who was managing and controlling that engine and train at the time this emergency was applied?

A. Engineer Stewart was handling the engine.

Q. Who was controlling it with signals?

A. I was giving the signals.

Q. Who had control of that train?

A. I was in charge of it.
Q. In what cases is it proper railroading to apply the emergency?

(Objection by Att'ys for Def't. Objection sustained; the Court ruling that the Rule as to that, must be introduced.)

Q. I here show you a green book on which is the following endorsement: "Issued to W. H. Stewart, employed as Engineer C. Division, 6/10/1908, L. & N. Railroad Company. Special Rules Concerning the use of Air-Brake and Whistle Signals. Revised January 6th, 1908." Is that the Book of Rules in effect at that time?
A. Concerning the Air-brakes, yes sir.
Q. Now as I understand there is a brake valve in the engine and a conductor's valve in the caboose. When the train is in motion the caboose is the rear car in the train?
281 A. Ordinarily, yes sir.
Q. There is a valve in the engine by which the engineer can apply the air and stop the train, and a conductor's valve on the caboose from which he can stop the train, it can be stopped from either end?
A. Yes sir.
Q. The *the* angle cocks can open up the air line or shut off the air line, and one of these angle cocks are on the rear end of each car?
A. Yes sir.
Q. I will show you the rule on Page 18 and ask you whether or not that rule was in effect at that time?
A. Do you wish me to read the Rule?
Q. Yes sir.

(Rule is here introduced in evidence by Att'y for Pl'ff and witness reads said Rule, which is as follows:
Rule on page 18 from book "Special Rules governing the Use of Air Brake and Whistle Signal, Revised Jan. 6, 1908.
Rule: "The emergency or quick action must never be used unless it is to avoid injury to life or property. No excuse will be taken for its use except as stated. The necessity for its use can be readily avoided by returning the handle to lap immediately after the release of the first application, and then applying the brakes lightly before the engine reaches the exact spot desired."

Q. Now what is the usual and customary way of applying that emergency, by whom is it ordinarily done?

(Objection by Att'ys for Def't. Objection overruled; to
282 which Att'ys for Def't except.)

A. The emergency is applied ordinarily by the first person who sees danger and get to the valve. If the engineer sees it first he will apply it first. If the engineer does not see the danger, and it is observed from the rear of the train, then the flagman or conductor will apply it.

Q. In the ordinary running and usual course of business, who is it that applies it?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. The emergency is not a usual proceedure, it is an unusual proceedure.

Q. And the Rule there depends upon the character of cases?

(Objection sustained. Rule speaks for itself.)

Q. Mr. Jones, I will show you another book upon which is printed "Revised Rules for the Government of Transportation and Telegraphic Department and for Movement of Trains by Telegraphic Orders. L. & N. R. R. Co.," which contains the following general notice: "It is of the utmost importance — General Manager's Office July 1st, 1892, reissued August 22, 1907, B. M. Starks, Gen. Manager." Is that the book of Rules in effect at that time?

283 Mr. Sims: "That part that he was reading we move to exclude."

Mr. Procter: "That is just to identify the book."

Q. Is that the Book of Rules that was in effect at the time of this occurrence on Sept. 5th, 1908?

A. Yes sir.

Q. You, yourself, don't know the condition of those switches and crossings at the time of this application of this emergency, if so, tell the jury?

A. The switches were lined for the main and the crossings were blocked.

Q. Was the train in the clear at the South end of the switch at that time?

A. Yes sir.

Q. At the time the Emergency was applied?

A. I think it was.

Q. You were at the far end of the siding?

A. No sir, I was at a point near the engine.

Q. The engine was at the North end or near the North end of the siding and the emergency was applied near the South end of the siding.

A. Yes, sir, at the South end.

Q. Did you have a conversation with Stewart after this emergency was applied?

(Objection by Att'ys for Def't.)

284 The Court: "You can ask him how long afterwards?"

Q. How long after this emergency was applied before you had this conversation with Stewart?

The Court: "He has not said he had any."

Q. Did you have a conversation with him after this emergency was applied?

A. Yes sir.

Q. What time had intervened between the time of this application of emergency and the conversation?

A. Well, after the emergency was applied and the angle cock closed, and the brakes was released, and we continued backing down far enough to cut the crossings and the crossings were open, and it was either on the way to or from the telegraph office that we were talking.

Q. Had 103 passed?

A. No sir, it hadn't come yet.

Q. You were backing down to let it pass at the time the emergency was applied?

A. To cut the crossings and at the same time clear 103.

Q. How long was it after this emergency was applied before you had this conversation with Stewart?

A. Several minutes.

Q. About how long?

A. It might have been as much as 10 or 15 minutes, possibly not so long.

285 Q. Your best judgment, was it as much as 10 minutes?

A. We had to wait for the brakes to release and move the train back, and open two crossings.

Q. Are you certain you opened the crossings before you had this conversation?

A. Yes sir because that was the first thing to be done.

Q. Why did you want to open the crossings then?

A. To comply with the State law that the crossings was not to be blocked over five minutes.

Q. Do you know any Tennessee law to that effect?

A. We have instructions to that effect.

Q. Where are they?

A. In the caboose.

Mr. Procter: "I move to exclude that, as I have not asked for that, I was not asking for any Tennessee law and he gave that, and I ask them to produce these instructions."

A. I will answer that by saying that we have instructions not to block any longer than is necessary, whether it is one or two minutes.

Q. Then you can go back and block them as long as necessary?

A. No sir we don't do that regardless of delay to trains.

Q. Are those instructions in writing?

A. Yes sir.

Mr. Procter: "I will ask your honor to exclude that testimony."

286 The Court: "He is your witness, and the declaration is in chief."

Mr. Procter: "It is competent if there is no written instructions, but when I find that the instructions are in writing, then I have the right to call for those."

The Court: "Let the answers stand, they are coming from your own witness."

Mr. Procter: "I will ask your Honor to instruct the witness to produce these written instructions."

The Court: "If he has them, he can bring them but the answer must stand in the record."

Q. What was that conversation between you and Stewart?

(Objection sustained.)

Att'y for Pl'ff makes the following avowal: "We expect the witness to state that he had a conversation with W. H. Stewart in a few minutes after this emergency was applied in which he said 'We were backing down or rather up for the purpose of cutting the crossing when the air brake was applied from the rear end of the train' and in the conversation with him he remarked "That was a
287 bright trick your flagman did and remarked that he was hurt in the shoulder by striking it in some way against the cab."

Q. What was he referring to when he said that was a bright trick your flagman did?

Objection sustained.

Att'y for Pl'ff makes the following avowal: "The witness would state that he was referring to the angle cocking of the train from the rear end."

(Cross-examination by Jno. B. Rodes, Att'y for Def't:)

Q. Where do you live?
A. Here.
Q. How long have you resided in Bowling Green?
A. Born and raised here.
Q. Practically lived here all your life?
A. Yes sir.
Q. Are you a married man?
A. Yes sir.
Q. Does your family live here?
A. Yes sir.
Q. Cumberland City is how far from Clarksville, Tenn.?
A. About 21 miles.
Q. North, or South?
A. South.

Q. Your run in 1908, was that the same as Stewart's run?
288 A. You mean that we were both working on the same Division?

Q. Yes.
A. Yes sir.
Q. Did you run between the same points that he did?
A. Well, now, at times I ran South of Paris, and it is my recollection that he only run between here and Paris.
Q. Now on his run there was a loop, that is to say he would run from Bowling Green to Paris and from Paris to Guthrie back North again and then turn and return to Paris, before he returned to Bowling Green?
A. That was very frequently done.

Q. When such runs as that were made, they would keep him out on the road some three or four days would they not?

A. Not if the run were continuous, all one straight trip.

Q. How long would he be away from home under such circumstances?

A. Well, possibly three or four days.

Q. In the case of such trips, railroad men who do take such trips, do they have boarding places in Paris?

A. Yes sir.

Q. Mr. Jones, as an experienced railroad man, running on that Division, in your judgment, what would be the expenses of an average man such as you knew Mr. Stewart to be while out on those trips and away from home engaged on his runs?

A. I should think on an average of $15.00 to $20.00 a month.

Q. He would get his meals wherever he happened to be at meal time?

A. Yes sir, if he had a chance.

289 Q. And would stop over night at his boarding place at Paris when it was necessary?

A. Yes sir.

Q. You were coming North on September 5th, 1908, when you reached Cumberland City?

A. Yes sir.

Q. Did you reach Cumberland City in the forenoon or afternoon?

A. Forenoon.

Q. I believe you said you could not state the time?

A. No, I know it was in the morning.

Q. When you reached Cumberland City was there a train standing there on the Main track?

A. My best recollection there was either a freight train there at the time or it came soon afterwards.

Q. On what track did you enter Cumberland City?

A. The first track, the siding.

Q. You entered far enough on the siding to clear the main track and let the train then there pass on South, didn't you?

A. Yes sir.

Q. In order to do that you had to clear the main track with your train at the South end of that switch?

A. Yes sir.

Q. What do you mean by clearing the main track with your train at the South end of that side track?

290 A. Moving in sufficient for the other train to pass without damage.

Q. In every switch there are switch points and a frog, are there not?

A. Yes sir.

Q. The frog is where the rail of one track is crossed by the rail of the other?

A. Yes sir.

Q. And the point of the switch is the final end of the switch?

A. Yes sir.

Q. What is the difference between the frog and the point of the switch?

A. Possibly 50 ft.

Q. It run some distance?

A. Yes sir.

Q. Isn't it a fact, Mr. Jones, that to get your train, say your caboose at the hind end of your train absolutely in the clear of the main track you had to run up some distance from the switch?

A. Yes sir.

Q. In your judgment how far Northward from the frog of the switch or the switch point would you have to run in order to absolutely clear your train of the main track?

A. Possibly 120 or 130 ft.

Q. The reason of that Mr. Jones, is it not, that the switch rail gradually leaves the rail of the main track and gets a further distance?

A. Yes sir.

291 Q. But that is very gradual and you have to come up some distance before adjoining trains will absolutely clear each other?

A. Yes sir.

Q. When the train that you found at Cumberland City had pulled in South then you expected from the North the passenger train 103, a fast passenger train going to Memphis?

A. Yes sir.

Q. You had to let your train on to the main track at the North end of the switch?

A. Yes sir.

Q. You told Mr. Procter that you found some cars or a car on the siding when you pulled in to it?

A. Yes sir.

Q. Did you push those cars ahead of the engine as you entered it?

A. Yes sir, pushed them ahead.

Q. In order to clear the North end of the switch so as to admit the passenger train you had to back Southward?

A. Yes sir.

Q. Where was your head brakeman at that time?

A. At a point near the head end of the train.

Q. Had you sent him up there?

A. He was ahead there, he has to be there.

Q. Did he have any duties as to the protection of 103?

A. Later he did.

292 Q. To show 103 that your train was there and not in the clear?

A. Yes sir.

Q. Then you gave the signal to the engineer to back?

A. Yes sir.

Q. If I understood you, the purpose of that signal was to clear the North switch so as to admit 103 and to cut or clear the crossings you have mentioned?

A. That is right.

Q. Now coming north, that siding is on which side of the main track?

A. Left side.

Q. And I believe you said the main track was practically straight right at Cumberland City?

A. Yes sir.

Q. On which side coming North is the depot or station?

A. Left side.

Q. Between the side track and river?

A. Yes sir, between the siding and Cumberland River.

Q. Across the side track from the main?

A. Yes sir.

Q. These crossings you speak of, one is a passenger crossing towards the North portion of the switch to let passengers back and forth to the station, and to the wharf on the river, and then the middle crossing that admits passengers or wagons, and further towards the South end is another crossing?

293 A. Yes sir.

Q. And you were up towards the head of that train standing on the main track?

A. Yes sir, standing on the main.

Q. And you gave the signal to the engineer to back?

A. Yes sir.

Q. Where was the flagman? O. L. Hill?

A. At a point near the rear of the train.

Q. When you gave the signal to back for the purpose of clearing the North end of the switch and cutting the crossing, was it your intention to leave the siding?

A. No sir.

Q. Did you expect to continue, was it your purpose controlling that train with your signals to continue the backing of that train until it entered the South switch?

A. No sir.

Q. Or one end of the main track at the South end?

A. No sir, not if it could be avoided.

Q. You could have avoided it by your signals, by stopping the train?

A. Yes sir, easily.

Q. The caboose at the South end can get out of the clear, or to state it differently, may foul the main track without ever entering upon the switch at all, in fact would be some distance from the switch?

A. Yes sir.

294 Q. If the caboose had run upon the switch it might have split the switch points mightn't it?

A. It would split them.

Q. You had no purpose to permit that to occur?

A. No sir.

(Objection by Att'ys for Pl'ff. Obj. overruled; to which Att'ys for Pl'ff except.)

Q. State whether or not splitting the switch and running out upon the switch might possibly have the effect of derailing the car?

(Objection sustained.)

Q. What would be the possible or probable effect?
A. It would split the switch and probably derail the car.
Q. Would it damage or injure property?
A. Yes sir.
Q. You have stated that it was your purpose in backing to clear or cut the crossing, could you have accomplished this purpose, and was it your judgment that you could accomplish this purpose and still keep your caboose from splitting the switch at the South end?
A. To the best of my recollection I could have done so.
Q. That was your judgment at the time?
A. That was my judgment at the time.

295 Q. Now is there an air-brake on the caboose or was there of that train, air valve?

A. I don't remember exactly when those valves were put on the inside of the caboose. The air was connected under and at the rear of the caboose by the train line before it was cut out by the rear angle cock.
Q. That is nothing but an air-brake at the end of the caboose?
A. It is a cut out point.
Q. A stop cock is it?
A. Yes sir.
Q. Your train was operated by a number of air-brakes?
A. Yes sir.
Q. The engineer could use them in the cab, and you or the flagman could employ the same air at the rear end of the train?
A. Yes sir.
Q. When the air brake was applied at the rear end of the train in the instance in question, I believe you said there was a jar of the train?
A. Yes sir.
Q. Which followed upon its stopping?
A. Yes sir.
Q. State whether or not there are such jars usual and incident to and customary to the operation of such freight trains on that road?
A. Practically every day.

296 Q. State whether or not the air or emergency air as it has been called, is applied frequently or not, in the ordinary operation of such trains on that Division?

A. Well now the emergency or conductor's valve which has been put in since that time, is used for stopping trains from the rear instead of the old angle cock, and those stops are frequently made when from any reason the signal is not being able to be given to the engineer in time to make a stop.

Q. Or if a signal is not obeyed?
A. Or if it is not obeyed, yes sir.

(Redirect examination by B. F. Procter, Att'y for Pl'ff:)

Q. I wish you would get your last time card and these instructions about blocking the crossings and get them back here?
A. I can not get those instructions without getting in communication with my officer.
Q. You can get that Time Card anywhere?
A. Possibly so, if they have an extra copy.
Q. There are plenty of engineers here that have them?
A. Yes sir they are all supposed to have them, but these instructions about blocking the crossings I don't know whether I can get that here at once or not.

297 *Testimony of W. C. Minor.*

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. What is your age?
A. Thirty-eight.
Q. What is your occupation?
A. Braking.
Q. Where do you live?
A. Here.
Q. What is your run?
A. From Bowling Green to Paris.
Q. Where were you on September 5th 1908 when W. H. Stewart was hurt?
A. At Cumberland City.
Q. What were you doing? What crew were you on?
A. I was braking for Conductor Jones.
Q. Where were you coming from at that time?
A. From Paris to Bowling Green.
Q. Who was your engineer?
A. W. H. Stewart.
Q. How long have you been railroading?
A. Ten years and a little over.
Q. In what capacity?
A. I was brakeman for a while and then promoted, and now I am braking again.
Q. How long were you conductor?
A. I don't remember exactly.
298 Q. Between what points were you conductor?
A. On all branches of the Memphis line in freight service.
Q. What time did you leave Paris on that trip?
A. I don't remember.
Q. Who was your fireman?
A. Sorrells.
Q. Who was Conductor?
A. H. T. Jones.

Q. Who were the brakemen?
A. O. L. Hill and myself.
Q. What was your position at the time?
A. Braking ahead.
Q. What was the position of Hill?
A. Flagging.
Q. What took place at Cumberland City on that trip, tell it in your own way?
A. We made Cumberland City and headed in there for 103 and the siding didn't clear us and of course 103 had to be flagged, and I was supposed to do the flagging for 103 and I don't know what else to say there exactly.
Q. Did you see the conductor give any signal to the engineer there?
A. As well as I remember I did, a back up signal.
Q. Where were you then?
A. Just ahead of the engine.
Q. Where was the conductor?
299 A. Not far from the engine as well as I remember.
Q. What signal did he give him?
A. Back up signal.
Q. What did the engineer do?
A. He obeyed the signal.
Q. Tell how the engineer answered the signal?
A. As well as I remember, three short blasts of the whistle.
Q. What is that the signal for?
A. That the train will be backed.
Q. What did Sorrells do then?
A. I don't know.
Q. What was it his duty to do?
A. It was his duty to ring the bell.
Q. As you were backing and as long as the train continued to back?
A. Yes sir.
Q. After that signal was given did the train start to back?
A. Yes sir.
Q. How far did it back?
A. I don't remember.
Q. What stopped it?
A. Why the brakes he put on from the rear, the brakes were set to stop the train.
Q. What sort of an application do you call it?
A. Emergency I suppose.
Q. You know, don't you?
300 A. Yes sir.
Q. What was it?
A. Emergency.
Q. Who did this?
A. Supposed to be O. L. Hill, he was flagging the car.
Q. Was it aplied from the rear, engine, or where?
A. From the rear.

Q. Who was there to apply it?
A. Mr. Hill I suppose, I didn't see anyone else.
Q. Did you see him when he made the application?
A. No sir.
Q. Did you see him immediately before?
A. Don't remember that I did.
Q. What were you doing at the time that he made this emergency application?
A. Standing just ahead of the engine fixing to go flag 103.
Q. What effect did it have on the train when he applied the air?
A. Stopped the train at once.
Q. What sort of jar or jerk did it put on the train?
A. Well, it would put a jar on there as quickly as any emergency application.
Q. Tell what sort it was?
A. That is as good as I can give it—the train would be stopped at once.
Q. How fast was that train going back at the time?
A. I don't know.
301 Q. How far did they back?
A. I don't know how far, not very far.
Q. As much as a car length?
A. I don't know, can't say, it has been a good while ago.
Q. Was your train in the clear at the North end? I mean when he applied the emergency.
A. It was not in the clear when he went to backing.
Q. Do you know how many cars you had?
A. I don't remember.
Q. Did you push any cars out of the siding?
A. Yes sir there was cars ahead of the engine.
Q. How many?
A. I don't know.
Q. More than one?
A. I can't say how many, there was several cars though.
Q. What effect did it have on the engine and those cars there. tell how much it was, how much jar was there, I mean the train and the engine?
A. It would be a jar equal to any emergency application of the brakes.
Q. Well, you understand?
The Court: "The jury don't know what that is, you can describe it."
A. I don't know how to describe it. It is just a sudden stop, all the brakes were turned on and set in emergency and that
302 made an immediate stop.
Q. Well, does that cause a heavy jar in the train?
A. Well I should think so, to a certain extent.
Q. Did you see Stewart at the time the jar came?
A. Yes sir.
Q. What was he doing?

A. I think as well as I remember he was hanging out of the window.

Q. What was he doing?

A. Looking for signals I suppose.

Q. Who was giving the signals?

A. The conductor.

Q. You had gone forward for the purpose of protecting 103?

A. A short distance, yes sir.

Q. Did you hear Stewart complaining after that of being hurt?

(Objection by Att'ys for Def't.)

The Court: "Right at the time, immediately after, if you saw him or observed him, you can state."

Q. Did you see him after that was applied?

A. Saw him all the way from there on.

Q. What was his condition?

A. I couldn't say, he complained at Clarksville about this, said it was a heavy jar on him.

(Objection sustained, as to what he said.)

303 Q. From his appearance could you tell whether or not he seemed to be suffering?

A. I don't know that I could, he was of a delicate nature any way, and a man complaining, you know——

(Objection sustained.)

Q. How long have you run as a brakeman and as a conductor?

A. Both?

Q. Yes.

A. I have been here a little over ten years.

Q. Was it usual and customary to apply the air brakes and put the train in emergency from the rear of the train?

A. Not ordinarily, no sir.

(Objection by Att'ys for Def't.)

Q. How is that ordinarily done, if it becomes necessary to set them in emergency?

A. From the conductor's valve in the caboose.

Q. Was that usually done by the conductor or the engineer?

(Objection by Att'ys for Def't.)

A. It would not be done by the engineer, for he would not know for what purpose they were using this emergency, it had to be done by the conductor.

Q. I am talking about how it is done, isn't it a fact that it is usually applied by the engineer?

304 (Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. It has been done by the engineer, but in a case of emergency from the train crew, it is done by the conductor in the caboose.

Q. Then it is proper for a man to apply it from the rear?
A. Yes sir.
Q. In all your experience how many times did you ever apply the emergency?
A. I can't say how many.
Q. Did you ever apply it?
A. Yes sir.
Q. How many times?
A. I don't know, I know I have used it a time or two.
Q. Tell under what circumstances you used it?

(Objection by Att'ys for Def't.)

The Court: "Well, let him state what is the proper and ordinary use of this application."
Mr. Procter: "I want him to illustrate the character of danger that justifies the use of emergency."
The Court: "The Rule there states danger to property or life."
Objection is sustained.

305 Q. You say that you had to saw by for 103?
A. Yes sir.
Q. Wasn't 115, South Bound, waiting for you at the time?
A. I don't remember.
Q. But you do remember going out flagging 103 and stopping 103?
A. Yes sir.
Q. That was the reason that the North end of the track was foul?
A. Not necessarily, the South end could be foul.
Q. At any rate the main track was foul at one end?
A. Yes sir, the main track was foul.
Q. What Rule of the Transportation Department governs you in that instance?
A. You must be protected against opposing trains.
Q. What is the number, isn't it 99?
A. Yes sir, Rule 99.
Q. At the time this emergency was applied, for what purpose were you flagging?
A. To get in the clear at the North end of the siding.
Q. Why did you want to clear that?
A. So the passenger train could pass down the main line.
Q. And you were at the head of the train for that purpose?
A. Yes sir.
Q. I will ask you this question: Please describe as fully as you can the character of cases where it would be prudent and proper for a railroad brakeman to apply the emergency, when the conductor and engineer are both in charge?

306 (Objection sustained.)

Att'y for Pl'ff makes the following avowal: We expect the witness to say "In case of a break-down or car leaving the track, brake beams down, or in danger of killing some one."

Q. What is the length of that siding there?
A. I don't remember the length.

Q. Do you mean to say that you are conductor, and don't remember the length of the siding?

A. Many of the sidings are extended, and that one has been, we have a Time Card showing the length of the sidings, there is a Time Card in all cabooses.

Q. And you as conductor have run by all of those?

A. It has been four or five years ago that I run a train.

Q. Then you acted as flagman?

A. I have flagged some.

Q. Don't you know the length of every other siding on that road?

A. No sir.

Q. Don't you know that the length of that siding is 720 ft.?

A. No sir I do not.

Q. Are you familiar with this book, "List of Stations and Names of Agents", have you seen that book before?

A. Yes sir.

307 Q. Don't that give the correct list of the sidings, all of them?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

Q. Don't that give the length of that siding?

A. Yes sir.

(Objection sustained.)

The Court: "Jones read that from the book, 720 ft.?

Q. That is the correct length then of that siding at Cumberland City?

(Objection sustained.)

Q. As shown by the book?

A. As shown by the book, yes sir.

Q. How many cars were in your train on that occasion?

A. I don't remember.

Q. Do you remember what time you got there?

A. Not exactly, no sir.

Q. About what?

A. Not far ahead of 103 time.

Q. What is 103's time?

308 A. 9 something, the Time Card changes, I don't remember exactly.

Q. About how far ahead of 103's time?

A. I can't say how many minutes, not very long though ahead of 103.

(Cross-examination by Jno. B. Rodes, Att'y for Def't:)

Q. Where do you live?

A. Bowling Green.

Q. How long have you been railroading?

A. A little over ten years between 10 and 11 years.

Q. What business did you do before you began to railroad?
A. Farmed.
Q. Are you a married man?
A. Yes sir.
Q. You have been running on the Memphis Division then haven't you?
A. Yes sir.
Q. Numerous sidetracks are along that Division?
A. Yes sir.
Q. Isn't it absolutely impossible for you or any man to carry in his head the length of all of those sidings?
A. That would be hard to do.

Q. You said Mr. Stewart was a man of delicate nature, you
309 mean physically delicate?
A. Yes sir.

Q. Prior to this Cumberland City affair did you ever hear him complain about his health?
A. Yes sir.
Q. Do you know of his taking medicine before that?
A. Yes sir.
Q. Did you ever see him take it or hear him speak of taking it?
A. I never seen him, he asked me to get him some medicine at Big Sandy, and I didn't have time, and I got it at Erin just a short while before we reached Cumberland City.
Q. On this trip?
A. It was, as well as I remember.
Q. He sent you at Big Sandy to get some medicine for him?
A. Yes but I didn't get it at Big Sandy and I got it at Erin.
Q. You got the medicine for him before he ever reached Cumberland City and on the same trip?
A. Yes sir, as well as I remember.
Q. Prior to that time, did you hear him complain of his health?
A. I don't know that I can state any special time.
Q. Generally, have you heard him complaining from time to time?
A. Well, yes sir, more or less.
Q. When you first pulled in at Cumberland City, you let the train go South that was then there?

310 A. I don't remember about that train being on the siding.
Q. At any rate you expected 103 to come in?
A. Yes sir.
Q. And you were out to protect against that train?
A. Yes sir.
Q. You saw the conductor give the signal to back the train?
A. Yes sir.
Q. That was the purpose, to clear the North end of the switch?
A. Yes sir.
Q. Was there any crossings at Cumberland City near the passenger station?
A. Yes sir, one near the passenger station.

Q. Is the passenger station on the opposite side to those two tracks?

A. Yes sir, between the siding and the river.

Q. So for people to reach the station they have to cross both tracks?

A. Yes sir, to reach the station.

Q. You saw the train come to a stop when it was being backed?

A. Yes sir.

Q. By application of the brakes?

A. Yes sir.

Q. There is and there was on that train a means of applying the brakes, not only on the engine but in the caboose, and also at the rear of the caboose, and in the caboose called the conductor's
311 valve?

A. Yes sir.

Q. And at the rear of the caboose it is called the angle cock?

A. Yes sir.

Q. Now you can stop the train by the application of this air, by the application of those air brakes, either on the engine, or in the caboose, or at the rear of the caboose?

A. Yes sir.

Q. I believe you told Mr. Procter that there was a jerk or jar when it came to a sudden stop?

A. Yes sir, the same as any emergency application of the brakes.

Q. Moving fast or slow?

A. Slowly, I don't know how fast.

Q. Did you see the jerk or jar of the train when it stopped?

A. Yes sir.

Q. As an experienced railroad man state whether or not in the operation of freight trains there are not naturally a lot of jerks and jars that can not be avoided, and which occur at any and all times in the operation of such trips?

A. Yes sir.

Q. Said jerks and jars, are they or not usual and customary in the operation of such trains?

A. Yes sir.

Q. Tell the jury whether or not this jar was like or similar to such other customary and ordinary jars in the operation
312 of freight trains?

A. I should think so, any emergency application of the brakes would be the same as this.

Q. In stopping a freight train are there any jerks and jars?

A. More or less, yes sir.

Q. In pulling it out are there any jerks or jars?

A. Yes sir.

Q. In going down a swag, or fill, or a dip, are there any jerks or jars?

A. Yes sir.

Q. What kind?

—. ——.

A. In going into a dip as they go together there is a jerk and in

going down the descent there would be another jerk of the slack running out of the train?

A. Yes sir.

Q. Was the jar on this occasion such as is experienced on any other such occasion as that?

(Objection sustained.)

Q. State how frequent you meet with such jars as you saw on that occasion in the operation of freight trains?

A. That is very frequently that jars come like that, especially in any kind of trouble like that.

Q. Does that happen frequently or otherwise?

A. It would happen frequently you might say, in any
313 kind of trouble when you would want to stop at any time.

Q. State whether or not such jerks and jars as you saw on that occasion, happen and occur almost daily in the operation of such freight trains?

A. Yes sir I see it frequently.

Q. I show you a blue book which Mr. Procter read from, "L. & N. R. R. Co. Special Rules Concerning the Use of Air-Brakes and Whistle Signals, Revised Jan. 6th 1908" from which he read the following clause on page 18: "The emergency or quick action must never be used unless to avoid injury to life or property. No excuse will be taken for its use except as stated. The necessity for its use can be readily avoided by returning the handle to lap immediately after the release of the first application, and then applying the brakes lightly before the engine reaches the exact spot desired. I direct your attention to the latter portion of that and ask you whether that can have any application to the applying of the angle cock?

A. No sir.

Q. To what does it apply?

A. To the engineer's valve on the engine.

Q. To what do these words apply "turn the handle to lap"?

A. That applies to the engineer's valve on the engine. It can be held open until the train stops.

Q. That applies to the engineer?

A. Yes sir.

314 (Redirect examination by B. F. Procter, Att'y for Pl'ff:)

Q. Mr. Rodes asked you about the condition of Mr. Stewart's health and you say that you heard him complaining of that jar on this trip, are you certain about that, that you heard him complaining of being sick on this trip?

A. I got him medicine on that trip.

Q. Didn't you tell them that you didn't get it?

A. No sir, I beg your pardon, I said I didn't get it at Big Sandy but got it at Erin.

Q. What sort?

A. I don't remember, they were some kind of tablets I got at the drug store.

Q. What drug store?
A. A. J. Mitchell's.
Q. Did you ever get him medicine only on that trip?
A. I am not sure it was, except he was injured at Cumberland City, and I heard him complaining at Clarksville.
Q. Aside from that, did you ever hear him complaining at any other time?
A. I don't know, I stated the time that I heard him.
Q. Wasn't you asked this question, to refresh your recollection you gave your deposition in this case March 25th 1902, did you not?
A. As well as I remember, yes sir.
Q. Page 73. Wasn't you asked this question: Q. How long had you known W. H. Stewart at that time? A. Ever since I
315 have been on the road. Q. What was the condition prior to this time, I mean the condition of his health? A. I don't know sir." Is that right?
A. I believe it was, I am not sure, it has been some time ago.
Q. And this question: "Of what did you hear him complain? A. I don't know sir. Q. Did you notice him after that?" to which you replied ——

(Objection by Att'ys for Def't.)
Mr. Procter: "I won't insist upon that."

Q. Now do you tell Mr. Rodes, and do you mean to tell this jury that you see that emergency application applied daily on the trains?
A. No sir, not daily, but I said frequently.
Q. Do you mean that it is frequently applied by the men in the ordinary business of the road?
A. No sir I didn't say ordinary business, I said frequently in case of trouble.
Q. You mean that it is applied somewhere on the road, but on no particular train?
A. No sir, no particular train, but some train might use it.
Q. It is of daily occurrence on some road in the United States?
A. No sir it would not apply to other roads.
Q. On the L. & N. road?
316 A. That is what I mean. It might be applied in any case where it was necessary.
Q. How many times have you ever applied it from the rear of the coach?
A. I don't remember.
Q. Do you remember to have ever applied it more than two times in your life?
A. I don't remember how many times.
Q. When was the last time that you applied it?
A. I can't give you the date but I can give you the place.
Q. As a flagman?
A. Yes sir, just South of Springville.
Q. What was the necessity?
A. Car broke down.

(Objection sustained.)

Q. Now Mr. Rodes asked you about the danger there, now what was the danger if any in applying the brakes on that occasion?

(Objection sustained.)

(Recross-examination by Jno. B. Rodes, Att'y for Def't:)

Q. There are other jerks and jars to considerable extent on freight trains in their ordinary operation other than that arising
317 from the application of emergency?

(Objection sustained.)

Testimony of T. A. Sorrells.

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. State your age?
A. Thirty-three.
Q. Where do you live?
A. Bowling Green.
Q. What is your occupation?
A. Fireman.
Q. Did you know W. H. Stewart?
A. Yes sir.
Q. How long did you know him prior to his death?
A. Two years.
Q. Were you at Cumberland City in the State of Tennessee September 5th 1908?
A. Yes sir.
Q. What position did you occupy at the time?
A. Fireman.
Q. Did you stop at Cumberland City on the North bound trip for any purpose?
A. Headed in there for the passenger train.
Q. What number of passenger train?
318 A. 103.
Q. If Stewart received any injury there in any way, tell in your own way what occurred?
A. He said he got hurt.
Q. Tell in your own way what occurred, how he got hurt, if at all?
A. We headed in there for 103 and there was some cars on the side track and we coupled to them and we shoved on in and was out of the clear, and the conductor gave the back up signal and the head brakeman went out to flag 103 and he was getting the back up signal and he was angle cocked and he said it threw him up against the cab.

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

Q. How long after, you saw the conductor give him the signal to back and he was backing?

A. Yes sir.
Q. And the emergency was applied?
A. Yes sir.
Q. What effect did it have on Stewart and on the train?

(Objection by Att'ys for Def't.)

The Court: "What did you see?"
A. I didn't see him at all.
319 Q. What effect did it have on the train?
A. Just stopped the train.
Q. What did you do?
A. I didn't do anything.
Q. What were you doing at the time?
A. Ringing the bell.
Q. Was that your duty?
A. Yes sir.
Q. What was Stewart doing the last time you saw him?
A. Standing up against the cab.
Q. Was he moving his engine or doing anything?
A. Not doing anything the last time I saw him, I was on the other side of the engine until after we stopped.
Q. What happened to you when this train was put in emergency there?
A. I was standing on the deck and I got overbalanced and caught against the tank.
Q. What caused you to get overbalanced?
A. The sudden stop of the train.
Q. What was it you caught against?
A. The tank.
Q. What did you do then?
A. Didn't do anything.
Q. What did Stewart do?
A. I don't know what he did, I didn't see him. I went over on the other side afterwards.
Q. How long?
320 A. About 10 or 15 seconds.
Q. Did you have any conversation with Stewart about any emergency stop?
A. Yes sir, I asked him what was the matter and he said the brakeman angle cocked him and stopped the train.
Q. What else did he say?
A. Not anything.
Q. Is that all you remember about it now?
A. That is all.
Q. What part of it did he say that hurt him, how did he say it hurt him?
A. Said it threw him up against the cab.
Q. What part of him did he say was hurt?
A. Said he hit his head against the cab.
Q. Did he say anything about his shoulder?

A. I don't remember whether he said anything about his shoulder or not.

Q. After that did you see him talking with Conductor Jones?

A. Yes sir I saw him talking to him.

Q. How long afterwards?

A. Just a few minutes.

Q. To refresh your recollection didn't he say when you went around there "I asked him what was the brakeman trying to do" and what did he reply to that?

(Objection sustained.)

321 Q. Didn't you ask him this "What is the brakeman trying to do?" to which he replied "Kill somebody I reckon."

(Objection sustained.)

A. Yes, I went around there and asked him what was the matter and what was the brakeman trying to do, and he said he was trying to kill somebody he supposed.

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

Q. What was the effect of that emergency application on your train?

A. Running slow, the sudden stop as slow as we were going——

Q. Was it a hard jar?

(Objection sustained.)

Q. How far had your train moved at the time this emergency was put on?

A. I don't know exactly how far.

Q. You were on the other side?

A. Yes sir on the other side of the engine.

Q. Did you see the conductor give Stewart the signal to back?

A. Yes sir.

Q. In obedience to that what signal did Stewart give?

322 A. I told you the back up signal, 3 short blasts of the whistle.

Q. And then you were ringing the bell?

A. Yes sir when the conductor gave the signal I went over on my side of the engine where I belonged.

Q. How many cars in front of the engine?

A. I don't know, six or eight, may be more.

Q. About how many behind you?

A. I guess between 25 and 35 cars.

Q. Do you know what time you got in there?

A. About 9:25 I reckon and laid there for 103.

Q. What time did 103 get in?

A. I don't know what time, they were on time I think.

Q. What was the time of 103 at that time?

A. About 9:30, I don't know exactly what.

Q. Was there a freight train standing on the main when you got there or not?

A. I don't recollect.

Q. What was the condition of Stewart immediately before the injury?

A. He was in bad health.

Q. What was the matter with him?

A. I don't know what was the matter with him, I am no doctor.

Q. Wasn't you asked about the condition of his health when you gave your deposition in this case?

A. No sir I think not.

Q. What was his appearance immediately after this emergency application, could you tell whether or not he was suffering
323 immediately after this application of air?

A. He mentioned it to me once between Cumberland City and Guthrie, what he said to the brakeman about it.

Q. Didn't you give your deposition before in this case at my office December 27th, 1910, and in which this question was asked you: (Q. Had you seen him immediately before this injury at Cumberland City, and if so, what was his condition?" A. He seemed to me as well as he always was.") Was that question asked and did you make that answer?

A. Yes sir, always was, I never had seen him well.

Q. Did you say anything in this deposition that you had never seen him otherwise but well?

(Objection sustained.)

Q. You don't know the speed of that train when this emergency was applied?

A. No sir.

Q. Do you know the condition of the train when this emergency was applied?

A. The condition of the train, no sir.

Q. Do you know where Hill was?

A. No sir, didn't see Hill.

Q. The only signals you saw were the signals given by the conductor?

A. Yes sir.

Q. I am requested to ask you, if you at the time that emergency was applied, or the train ordered to back by the conductor,
324 was that train on the side track or main track?

A. On the side track.

(Cross-examination by Jno. B. Rodes, Att'y for Def't:)

Q. Are you a married man?

A. Yes sir.

Q. I believe you said you lived in Bowling Green now?

A. Yes sir.

Q. You stated that Mr. Stewart had been in bad health, I will ask you if you ever saw him taking medicine prior to this occasion at Cumberland City?

A. Yes sir.

Q. Were you his fireman?
A. Yes sir.
Q. Made trips with him?
A. Yes sir.
Q. Fireman in the same cab with the engineer?
A. Yes sir.
Q. Did you ever hear him prior to that time complaining of feeling bad?
A. Several times.
Q. What kind of an appearance did he have with reference to physical health, did he look like a stout healthy man or a delicate man?
A. He was a delicate man.
Q. In appearance?
325 A. Yes sir.
Q. On September 5th, 1908, the day of this occurrence at Cumberland City you were his fireman, were you before that?
A. Yes sir a few trips.
Q. Did you come on to Bowling Green with him on that trip?
A. Yes sir and made other trips?
Q. As fireman on the same engine?
A. Yes sir.
Q. After that trip did you ever hear him make any complaint about that Cumberland City matter, or mention it?
A. He never mentioned it to me at all after the day he was hurt.
Q. Do you know his signature "W. H. Stewart?"
A. Yes sir.
Q. Does the engineer and the fireman, or did the engineer and the fireman have to sign what is known in railroad parlance as a trip card?
A. The engineer signs that.
Q. Sometimes the firemen sign them?
A. Sometimes the fireman makes them out for the engineer.
Q. Isn't it true that sometimes the engineer signs for the fireman?
A. Yes sir sometimes signs his name when he makes out the card.
Q. And they show the date and the number of the card?
A. Yes sir.
Q. I show you here a number of cards and ask you to look
326 at all of them and say whether or not they are not made out and signed by W. H. Stewart, look through them and see if they are the same ones?
A. Yes sir this is his signature to each of them.
Q. Now take this one here, what trip does that show and what is the number and the date of the trip?
A. 5th of September, 1908.
Q. From what place to what place?
A. From Paris to Bowling Green.
Q. That was the trip when you passed through Cumberland City?

A. The trip he got hurt.
Q. The next, what date does that show?
A. The 9th of September, 1908 from Bowling Green to Paris.
Q. And returned?
A. No sir.
Q. Where from?
A. From Bowling Green to Paris.
Q. Is that the whole trip?
A. Yes sir that is a trip.
Q. Take the next one, the date and trip?
A. 10th of Sept. 1908, from Paris to Guthrie and return to Paris.
Q. Take the next card and see the date and trip, see what date and trip that was?
A. The 14th of September 1908 from Paris to Guthrie and return.

327 Q. Now the next trip he made according to the card?
A. 16th of September, 1908, from Paris to Bowling Green.
Q. Next trip and date of it?
A. September 18th, 1908, from Paris to Bowling Green.
Q. Next card, show the date and the trip it represents?
A. From Bowling Green to Guthrie 2nd of September.
Q. That was before the 5th then?
A. Yes sir.
Q. I will ask you if as shown by these cards you were his fireman in all of those trips except one after he got hurt after the 5th of September, 1908, or perhaps two, I don't recollect?
A. I was his fireman on all except two trips.
Q. And I believe as you said that during none of those trips did you hear him complain of what happened at Cumberland City?
A. No sir, he never said anything to me at all.
Q. Shortly before Sept. 5th, 1908, were you and Stewart in any wreck or derailment?
A. Yes sir, once.
Q. Where?
A. At McKinnon.
Q. When was that?
A. August 22nd, 1908.
Q. Were you and Stewart both on the engine?
A. Yes sir.

328 Q. What happened to the engine, and if he got any jar, what kind of a jar did he receive?
A. We run over a derailer and got the engine and front trucks on the ground and ties.
Q. Before getting off the track did it bump on the ends of the ties?
A. Yes sir.
Q. Did the engine turn over?
A. No sir, the engine never turned over.
Q. State whether or not as a railroad man under these circumstances, the engineer received any severe jerks or jars?

A. He would get pretty good jars running over ties with the engine.

Q. How about when it was derailed or thrown off the track?

A. Oh, it was a pretty heavy jar when we run over that derailer and hit on the ties.

Q. When you come into Cumberland City on September 5th do you recollect whether there was a train already standing there?

A. I don't remember.

Q. You do know that you were expecting passenger train 103?

A. Yes sir.

Q. And that Minor went out front to protect against that train?

A. Yes sir.

Q. Did you see the conductor give the signal to back the train?

329 A. Yes sir.

Q. Which side were you on?

A. On the engineer's side standing in the deck.

Q. Then where did you go?

A. On the fireman's side and commenced ringing the bell.

Q. Could you see the engineer then?

A. No sir.

Q. What happened then when the train was stopped by the air-brake on the engineer's side, you don't know?

A. No sir, couldn't see.

Q. What was between you and him?

A. The boiler.

Q. In the operation of all freight trains are there any jerks and jars necessarily incident to the operation of freight trains?

A. Frequently we have jars in running through dips and the slack will run back.

Q. In your judgment to give a measure of it, in a train of about 30 cars, about how much slack would there be?

A. Something near a car length.

Q. In the taking up of slack in the stopping of trains are there any jerks or jars?

A. Possibly there would be.

Q. Would the cars bump together?

A. Yes sir.

Q. In going down dips, what kind of jars?

A. The rear end will run up and hit the front end of the
330 train and when you go out of the dip the slack will run out and cause a jerk.

Q. In the operation of a train by the engineer, the engineer can make what is called a service application of the air-brake can he not?

A. Yes sir.

Q. State whether or not there sometimes occurs what is called a quick action triple in making service applications?

A. They will go into emergency sometimes, it is frequently the case.

Q. I will get you to state whether or not a jerk or jar of the

train as it occurred there at Cumberland City was such as was usual and incidental and customary in the ordinary operation of freight trains?

A. Well, sometimes we have jerks.

Q. Can you operate a freight train at all without jerks?

A. Sometimes you can, lots of times.

Q. On every trip you make?

A. I would not say every trip, we have jars occasionally. I don't know what about the other part, but the engine is not jerking.

Q. How about going down dips?

A. The slack runs out of the rear end, there is not a very heavy jar.

Q. In this instance was this jar hard or soft?

A. Well, it was about a medium jar I suppose.

Q. A medium jar such as is usual and customary, and met
331 with in the operation of freight trains on that Division?

(Objection by Att'ys for Pl'ff. Objection sustained.)

The Court: "Ask what he means by a medium jar."

Q. Do you mean such as is usually met with in operating freight trains?

A. Yes sir, I have had several jars of the same kind in operating freight trains.

Q. There has been read to the jury a portion of the book of air-brake and whistle signal rules as follows: "The emergency or quick action must never be used unless it is to avoid injury to life or property. No excuse will be taken, the necessity for its use can be avoided by returning the handle to the lap — the engine reaches the exact speed desired." I will call your attention to that portion which speaks of "returning the handle to the lap" immediately after the first application, and ask you to whom that refers?

A. The engineer.

Q. Can it have any application to the conductor in the caboose or flagman at the caboose?

A. No, they haven't got anything to do with that part of it.

Q. Can you use that with the angle cock, is there any
332 handle to be returned to the lap in the operation of the angle cock?

A. No sir.

Q. That applies to the engineer in the performance of his duty?

A. Yes sir.

Q. As to the speed that train was going when it was backing in that siding, I will ask you whether or not it was fast or slow?

A. It was slow.

Q. Do you know the position Stewart was in at the time the train was stopped?

A. No sir, couldn't see the position.

(Redirect examination by B. F. Procter, Att'y for Pl'ff:)

Q. Mr. Rodes asked you about these special signal rules, are you familiar with this: "Emergency must never be used except to avoid

injury to life or property," that applies to its use by anybody does it not?

(Objection by Att'ys for Def't. Obj. overruled; to which ruling the Att'ys for Def't except.)

Mr. Rodes: "He didn't read it all."

333 The Court: "He can ask him if he knows what this applies to."

Q. Answer the question?

A. I answered the question, I said the train crews use it, other people are not allowed to use it. If they see it is liable to damage property or kill anybody, but nobody else ain't got no right to be using it.

Q. Mr. Rodes asked you if it was not usual and an ordinary occurrence to have jerks and jars in a train, and you stated that you had seen those jerks and felt those emergency jerks a few times. The emergency jerks are only used in case of injury to life or property, and while they are recognized as dangerous they are only used to avoid greater injury than the injury to the men on the train?

A. Ask the question again.

Q. I say the emergency stop is recognized as a dangerous stop. Isn't it recognized as a dangerous stop?

(Objection by Att'ys for Def't. Objection overruled; to which Att'ys for Def't except.)

A. They use that to keep from killing people and destroying property.

Q. And they are the circumstances under which it is justifiable to use it?

A. That is what it is used for.

334 (Recross-examination by Jno. B. Rodes, Att'y for Def't:)

Q. You say it is used to prevent destruction to property or life either one?

A. Yes sir.

Q. And that emergency can be applied either by the engineer or by the flagman in the rear?

A. Yes sir.

Q. There are plenty of stops of the freight train made without using the emergency, that jerk and jar those on the train?

(Objection by Att'y for Pl'ff. Obj. overruled, to which Att'y for Pl'ff excepts.)

A. Repeat the question.

Q. Are there not many stops of the freight train that jerk and jar the train crew when there is no emergency application of the air-brakes?

A. Yes sir.

Q. And such jerks are equivalent to such jerks and jars as you experienced at Cumberland City?

(Objection sustained.)

Att'y for Def't makes the following avowal: "The witness
335 will answer that he frequently experiences in the operation of freight trains just such jerks and jars as was experienced at Cumberland City when there was no emergency application whatever and such jerks and jars are usual and customary in the ordinary operation of said trains."

Testimony of O. L. Hill.

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. Were you flagman on the train on which W. H. Stewart was engineer? On Sept. 5th 1908 running from Paris North to Bowling Green?

A. I don't remember the date but I think I was the flagman on the train you speak of.

Q. Were you on the rear end of the train?

A. Yes sir.

Q. The flagman's duties are at the rear end?

A. Yes sir.

Q. Do you remember what was done at Cumberland City on that occasion?

A. I remember we headed in the side track to let 115 by and 103.

Q. What time did you reach the place?

A. I suppose it must have been nine o'clock I guess in the morning.

Q. Do you remember the time of 103 at that time?

336 A. It was due there at 9:22 or 9:23, I won't be certain.

Q. Tell the jury the first thing you did when you reached the station?

A. We were headed in the side track and after we headed in I closed the switch behind my train.

Q. Who opened the switch?

A. The head brakeman.

Q. Minor opened the switch, he was the head man?

A. Yes sir.

Q. You as flagman came in and closed the switch?

A. Yes sir after the train entered the side track.

Q. When he got there the switch was set for the main and he threw that and let his train in on the side track?

A. Yes sir.

Q. Then left it on the side track?

A. Yes sir.

Q. And after your train, the caboose, cleared the main track at the South end you closed the switch back for a moment?

A. Yes sir.

Q. That permitted 115 to pass out?

A. Yes sir.

Q. Then when 115 passed out you left it still set for the main?

A. Yes sir.

Q. Did you test that with the lock and key to see if it was securely fastened?

337 A. Always do that, yes sir.

Q. What else occurred?

A. After we were in the clear and 115 passed they began backing up, and I stopped them.

Q. How did you stop it?

A. By the angle cock on the rear end.

Q. There was a conductor's valve in the caboose wasn't there?

A. In the caboose there was, yes sir.

Q. But you used the angle cock in the rear?

A. Yes sir it is on the rear end of the caboose.

Q. The conductor's valve was on the inside of the caboose?

A. Yes sir.

Q. Tell the jury if that train was about to run over anybody at that time?

A. If it was I didn't see it.

Q. For what purpose did you apply that angle cock?

A. So I could get to the switch in case he wanted to back out and throw the switch before he ran through it. I wanted to stop him before he ran through the switch.

Q. You didn't know whether he wanted to back out or not?

A. I presumed he did by him backing up.

Q. You didn't know how far he was going to back, he was answering the signals from the conductor wasn't he?

A. I don't know who he was answering signals from.

Q. It is against the Rules to move without signals from somebody?

A. Yes sir.

Q. Where were you when he began to back?

338 A. Somewhere between the crossing at the South end of the side track and the middle crossing.

Q. How far from the switch stand?

A. I don't know, I was between the two crossings.

Q. How many feet?

A. That would be hard to say the number of feet, for I don't know.

Q. How many, you know something about it. Don't you pass by that station every day?

A. Very near; I never had occasion to measure it and I never had occasion to hear anybody say they had measured it but I was about half way between the two crossings.

Q. Was it as much as 100 ft. or 200 ft. from the station?

A. It might have been 100 ft. or 200 ft., I won't be certain.

Q. How far was the caboose from the switch staff when it stopped?

A. It was about half way over the crossing, I don't know how many feet.

Q. How far is that crossing from the switch staff?

A. I couldn't say in feet, how many.

Q. When that train started backing, how far did it back before you applied the emergency?

A. Possibly a car length or a car and a half.

Q. Was the caboose North or South of you at the time it started backing?

A. Bound to have been South of me.

Q. Why?

A. I was at the North crossing.

339 Q. How far were you from the end of the caboose?

A. Possibly three car lengths.

Q. When it started backing what did you do?

A. I gave them the stop signal.

Q. Then what else did you do?

A. Continued giving stop signals.

Q. How many stop signals did you give?

A. I don't know, until I saw he was not going to stop.

Q. Then what did you do?

A. I went and stopped him myself.

Q. You didn't know for what purpose he was moving, you say?

A. No sir.

Q. What speed was he going when you put the train in emergency?

A. That would be hard to say.

Q. Was he going exceeding a mile and a half an hour?

A. Something like that, not over that I shouldn't think.

Q. Was that switch set for the main then?

A. Yes sir.

Q. And what was your object you say in stopping that train?

A. To prevent him running through the switch.

Q. What else?

A. That is what I say, and to keep in the clear for 103 was due at that time.

Q. That was coming from the North wasn't it?

A. Yes sir.

Q. You knew the North main was foul didn't you?

A. No sir.

340 Q. How many cars did you have?

A. Can't say, Mr. Jones' train book shows.

Q. How many cars were on the siding when you got there?

A. I didn't know, I found out afterwards.

Q. You didn't know anything about the condition of the train at all?

A. Not at the head end, no sir, my duties are at the rear end.

Q. You gave your deposition in this case, didn't you?

A. Yes sir.

Q. Didn't you say to Mr. Minor, and isn't it true that you applied that emergency there to bunch the slack?

(Objection by Att'ys for Def't. Objection overruled; to which Att'ys for Def't except.)

Q. You were asked in that deposition Mr. Hill "Do they ever

use the emergency brakes to bunch the slack in the train?" to which you replied "Yes frequently."

(Objection sustained.)

Q. Do they ever use the emergency to bunch the slack in a train?
A. Yes sir.
Q. Is that often done or otherwise?
A. Very frequently done.
Q. How much slack is there in a train of 30 or 35 cars?
341 A. It will average from a foot to a foot and six or eight inches.
Q. For what purpose is it used?
A. To bunch the slack, we get to the track with 39 cars maybe and engine and caboose, and we bunch the slack and get in the clear, applying air from the rear end and get in the clear, it is very frequently done.
Q. Now were you trying to bunch the slack on this occasion?
A. Yes sir, principally that.
Q. And for what other purpose, if any?
A. To prevent him from slacking out further than he did.
Q. In other words you just wanted to stop him?
A. Yes sir to keep him from backing out before I could get to the switch.
Q. Why is it that you are forbidden to apply that emergency stop except to protect life or property?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

Q. Isn't it dangerous to life and to property to apply that emergency stop?
A. I don't know that it is dangerous to life, it is dangerous to property sometimes, it very frequently pulls out drawheads.
Q. Isn't it liable to hurt the men on the train when you apply that emergency?

342 (Objection sustained.)
Att'y for Pl'ff makes the following avowal: We expect the witness to state "Yes sir."

Q. I want to ask you this further question to refresh your recolection, if you were not asked on the former trial of this case: "Q. Then why is it that you are forbidden to apply that emergency stop except to protect life or property"?

(Objection sustained.)
Att'y for Pl'ff makes the following avowal: We expect the witness to reply as set out on Page 96.

Q. Mr. Hill I am requested to ask you if you didn't know at the time you applied that emergency, that the North end of your train still fouled the main?
A. No sir I did not know it.

(Cross-examination by Jno. B. Rodes, Att'y for Def't:)

Q. How old are you?
A. Thirty-eight.
Q. What is your position with the Railroad Company?
A. Conductor.
Q. How long have you been a conductor?
A. I can't be positive.
Q. What were you before you became a conductor?
343 A. Flagman.
Q. You were flagman in 1908?
A. Yes sir.
Q. Prior to Sept. 5th 1908 did you run any with Mr. Stewart or make any trips with him as part of his train crew?
A. Yes sir, frequently.
Q. What kind of a man was he with reference to physical health, do you know whether he complained any?
A. At that time he had been complaining a right smart, he was complaining the day in question.
Q. Do you know whether he had been taking any medicine?
A. Yes sir he sent our head brakeman that day to get medicine at Big Sandy and he didn't get it there and got it at Erin.
Q. Prior to that time did you hear him complain of being unwell?
A. I hadn't been with him for several months and can't say.
Q. What was his physical appearance with reference to physical vigor?
A. Well you might say he was not a robust man, he was a man something like my build or somewhat lighter, about the same appearance I have got, delicate looking, is about all I can say.
Q. You say you had not run with him for several months?
A. No sir I had not, the reason why, I had been on the Paris
344 and Central City coal runs, the same Division, but different runs.
Q. When you pulled into Cumberland City, was there a train then on the track, standing there?
A. Yes sir, on the main.
Q. What did you do when you got there?
A. Threw the switch for the main line.
Q. And went into the side track?
A. Yes sir.
Q. Then the train that was standing there, what became of that?
A. That left ahead of 103.
Q. Before they pulled out you say the switch was thrown for the main, and you were on the siding?
A. Yes sir.
Q. Your position was at the rear end?
A. Yes sir.
Q. Was there a caboose on the train?
A. Yes sir.

Q. I believe those air brakes by means of which your train was operated, could be applied both at the engine and in the caboose, or at the rear of the caboose?

A. Yes sir they are capable of being applied at the rear end by opening the angle cock.

Q. After this train had pulled South, what became of you?

345 A. I started from the switch and started up to the second crossing.

Q. What for?

A. To open this crossing to allow traffic to cross.

Q. Was that your duty under the Rules of the Company?

A. Yes sir under the Rules of the Company by Special Instructions.

Q. Was it your duty to open that crossing?

A. Yes sir.

Q. And you say you started there for that purpose?

A. Yes sir.

Q. As you were going there was any movement of the train made?

A. I suppose I had got half way between the two crossings and they began backing up.

Q. Which side of the train were you on as you went North?

A. Right hand side walking up the middle of the main at the time?

Q. What became of you then as he started back?

A. I looked ahead and looked back trying to figure out what they were doing and I gave them stop signals.

Q. How far was the caboose from that switch at that time?

A. I would not be positive in feet.

Q. How about its relation to the first crossing?

A. They were about a half car length North of that crossing when they started backing up.

346 Q. And towards the switch?

A. Yes sir.

Q. About where did that caboose get out of the clear, or was it out of the clear? Where did it have to be to be in the clear?

A. It had to be just North of this crossing to be in the clear, the caboose if it blocks the South crossing at Cumberland City it is out of the clear, and that is the first crossing after you enter the switch along about that livery stable.

Q. And as it went back the caboose got out of the clear then?

A. Yes sir.

Q. That crossing is about how far from that switch?

A. Well, I would have to kinder estimate that.

Q. If you are not certain, give your judgment?

A. I am not certain in feet, possibly somewhere about 100 feet or round about it.

Q. Now you say you gave the signal?

A. Yes sir the stop signal.

Q. Did you give it more than once?

A. Yes sir two or three times.

Q. Which way were you going?
A. Running towards the rear end.
Q. Where were you placed with reference to the main track?
A. Running on the main.
347 Q. Was your stop signal obeyed?
A. No sir.
Q. When you saw it was not obeyed, what did you do?
A. I used the angle cock to stop him.
Q. If that caboose had continued further and run out further what would have happened?
A. Run out and split the switch, derailed a car, and possibly damaged the caboose and two or three cars.
Q. State whether or not it was your duty to stop the train?
A. Yes sir to save myself from suspension and also the Company from loss on it.
Q. Why did you not continue to go on and throw the switch or line it up, so that the train would run out on the main?
A. Well, very frequently you catch one of those locks that will take two or three minutes to get the key to enter them and have trouble in throwing them, and it is dangerous to try it.
Q. Did you have time to do that with safety to the Company's property?
A. I did not.
Q. Acting on that judgment you used the angle cock and stopped the train?
A. I did.
Q. Under the Rules of the Company is it your duty to apply the angle cock in emergency to protect the Company's property?
348 A. Yes sir.
Q. I refer you to the book Mr. Procter has introduced: "Special Rules for air-brakes and whistle signals" it says "The train line valve must always be applied on freight trains, but neither this or conductor's valve must be used except in cases of emergency. If conductor's valve can not be reached, open cock in the rear". Was that Rule prevailing at that time?
A. Yes sir.
Q. What did you do?
A. Opened the angle cock wide open.
Q. Was that the proper way?
A. Yes sir.
Q. Under the Rules of the Company, when is it proper to use the emergency brake?
A. Only in cases of emergency to prevent danger and accidents and such as that, splitting switches, danger to life or limb or anything.
Q. Or property?
A. Or property or anything.
Q. State whether or not it was your judgment when you found that the engineer didn't obey your stop signals and at or about the time you applied the angle cock that that caboose was going to run out upon that switch and split the switch?

A. To the best of my knowledge at that time that is what I thought.

349 Q. And you acted upon your judgment at that time?

A. Yes sir.

Q. Did the stopping of that train cause any jerk or jar?

A. It didn't in the rear end.

Q. Is or not some jerking or jarring incident to every stop?

A. Oh, yes, any freight train stop, you can't prevent that.

Q. State whether or not such jerking or jarring as must have happened on that occasion was the usual and customary jerking and jarring ordinarily met with in the operation of freight trains?

A. Every day of the world.

Q. Under the Rules of the Company is there any other method of applying that angle cock except to pull it open and keep it open?

A. No sir they never do it any other way.

Q. And that is the way you applied it?

A. Yes sir.

Q. Do you know how long that siding was, do you know what its capacity was?

A. 41 cars I think, and that would be based on 40 ft. length, would be 1640 ft.

Q. Is that your judgment?

A. Yes sir that is the length of it now, and it is the same length as it was then.

(Redirect examination by B. F. Procter, Att'y for Pl'ff:)

350 Q. Now you say that the emergency as it was applied that day, is applied for the purpose of stopping cars every day?

A. Yes sir, I don't guess there is hardly a day that goes by that some one don't use ti that way.

Q. On some road?

A. Yes sir, on some road, possibly it is used every day.

Q. You didn't mean to tell Mr. Rodes or the jury that it is used on any particular train every day?

A. No.

Q. Or that any other crew uses it every day?

A. No sir, I would not attempt to say that.

Q. And you don't know how many times it is used in the world on any other train?

A. No sir that would be a random guess.

Q. Now Mr. Rodes asked you if it was not the proper thing to do, to apply that emergency to stop that train from going through that switch, is that right?

A. Yes sir.

Q. Isn't it true that you are a very nervous man and you applied the emergency on that occasion when it was not necessary?

A. No sir.

Q. Isn't it true that you are addicted to the use of cigarettes?

(Objection by Att'ys for Def't. Objection overruled; to which Att'ys for Def't except.)

351 Q. Isn't it true that you were under the influence of cigarettes and that you are addicted to the use of cigarettes then and now?

A. No sir I was not.

Q. Isn't it true that you were using cigarettes at that time?

A. No sir, didn't use them at that time.

Q. When did you take it up?

A. In the last two or three months.

Q. Isn't it true that you had your fingers colored with the nicotine of the cigarettes when you testified before?

A. I smoke a pipe nearly all the time, and it is only occasionally that I pick up a cigarette.

Q. Is that true that your fingers were stained from nicotine from a pipe at that time?

(Objection sustained.)

Q. You had just sawed by 115?

A. We let 115 out, they were standing on the main when we got there.

Q. You had to saw by 103 afterwards?

A. I don't say whether we sawed by with them or not, I don't remember that.

(Recross-examination by John B. Rodes, Att'y for Def't:)

Q. I am requested to ask you if at the time you applied the air at the caboose, whether or not the caboose at that time

352 was out of the clear or had fouled the main?

A. I was about the middle of the road crossing, and as well as I remember one corner of the caboose was positively out of the clear fouling the main.

(Redirect-examination by B. F. Procter, Att'y for Pl'ff:)

Q. Do you mean to say that when it stopped it had fouled the South main?

A. Yes sir.

Testimony of T. R. Neill.

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. Where do you live?

A. Bowling Green.

Q. How long have you lived here?

A. I have been here about thirty-eight years or thirty-seven.

Q. Well, how long did you railroad?

A. Well, about 28 years all together.

Q. How long did you act as conductor?

A. About fourteen years.

Q. How long did you act as brakeman?
A. Well I was conductor I guess 22 years.
Q. How long since you quit railroading?
A. It has been nine years I reckon.
353 Q. That would have been up to 1905?
A. Yes.
Q. What is your business now?
A. Coal Business.
Q. What track did you run over?
A. Over the Memphis line.
Q. Are you familiar with the track at Cumberland City?
A. Yes sir I was at the time.
Q. Are you familiar with the Rules of operating trains by air-brake and by emergency air and things of that kind?
A. Yes sir I reckon I knew how to use it then.
Q. You have seen it done enough haven't you?
A. Yes sir.
Q. Say on September 5th 1908 a train was proceeding North and it became necessary to take the siding at Cumberland City and the parties operating a freight train was required to take that siding to let out another freight train there and to let out a South bound passenger train and the freight train taking the siding found other cars on the siding and the cars on the freight train and the other cars on the siding were longer than the siding and it became necessary to saw by this freight train that stood upon the siding and to saw by also for the passenger train. Now what
354 would have been the proper movements upon the part of that freight train taking the siding?

(Objection by Att'ys for Def't. Obj. overruled; to which Atty's for Def't except.)

A. Well they would not have had anything to have done but to pull that train in as far as they could and stop and let the other train pull down and go on out of the switch if there was room enough.
Q. Say that the train that took the siding was so long that they could not occupy the siding?
355 A. They could pull in to the siding and let the passenger train come on to the main, and then when it went on to the main, they could go on out.
Q. Say 115 occupied the space between the points of the switch siding, would it be necessary for this freight train to foul the North end of the main?
A. No sir, they would not have done that if they could not have passed, if they fouled both ends the North bound train was pulling into the side track.
Q. They first got out 115, then would it not have been necessary, if this side track would not hold the freight and the cars that was in the siding when it got there, would not it have been necessary for the North end of this cut of cars to put in behind this train so as to let this train out at the South end?

(Objection sustained.)
The Court: "Ask him what would have been proper."

Q. We want to let 115 that was standing there when the North bound freight came in by, and the North bound freight was too long for the siding, wouldn't it have been necessary to have pulled the North end of the North bound train down the South end of 115?

A. What we would call that when I was railroading was cut and saw which was to pull that train in as far as we could get. Pull the train that was on the main track to clear the switch, and leave that other one North of the switch, and then the other one would pull its hind end in the clear so that we could go on and
356 then this man came back and he cleared and went on and then the man going south would go on. There was no use cutting the passenger train for it would have cleared.

Q. Wouldn't it have been easier to back that train into the rear if the main track between the two points of the siding would clear the freight train, couldn't you have just sawed by?

A. Oh, yes.

(Objection sustained.)

Q. Taking it that the South bound main was shorter than the siding?

A. You mean the clearance between the switches, yes sir.

Q. What would have been the proper thing to do?

A. They couldn't have done anything else than to cut off to clear to get by them, if I understand what you said that that passenger train would not clear.

Q. The passenger train would clear though?

A. Why just pull in and saw by.

Q. But the siding would not clear the North bound freight?

A. If the freight train was there, just pull on in and let the freight train go by.

Q. After 115 passed by and went South, they had been compelled to foul the North end of the main and started backing in order to let 103 by, and the switch at the South end of the siding was
357 set for the main track instead of the siding, what would have been the duty of that rear brakeman or flagman?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. It would have been his duty to have thrown the switch for the siding.

Q. When those three signals were given, the blasts of the whistle, what does that indicate to every person about that train?

A. It indicated that he was going to back up.

Q. Then you say it was the duty of this flagman to have gone down there and opened up the siding?

A. Yes sir.

Q. What was his duty then when that train had backed through that siding, what should he have done?

A. When the train backed up he should have gone to the rear end of the train and gotten on the rear end and went on back with it.

(Cross-examination by Jas. C. Sims, Att'y for Def't:)

Q. You haven't railroaded any for a number of years?
A. It has been about nine years I guess.
Q. You were not railroading any in 1908?
A. No.
358 Q. Nor four years before that?
A. No sir.

Testimony of Capt. George James.

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. Where do you live?
A. Bowling Green, Ky.
Q. How long have you lived here?
A. About thirty years.
Q. How long did you railroad?
A. About 25 or thirty years.
Q. When did you do your last railroading?
A. I think it was in 1905.
Q. Where was your last railroading done?
A. On the main line, First Division, between here and Louisville.
Q. Are you familiar with the rules and regulations for switchmen in the operation of the air on freight and passenger trains, if so, were they the same at the time you were on the train as they were in Sept. 1908?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. Yes sir I think they are.
Q. In what capacity did you run?
A. I was freight brakeman, passenger brakeman, baggage man, and train conductor.
Q. Did you ever work in the yards?
A. Yes sir.
359 Q. Where?
A. In Nashville.
Q. Did you ever work in the yards here?
A. No sir I never switched in the yards here.
Q. Are you familiar with the yards at Cumberland City?
A. Well it has been about 30 years since I was on the Memphis line.
Q. I will just ask your opinion as a railroad man, say that they have a siding there at Cumberland City. I show you here 3 photographs of the track there at Cumberland City, Track No. 1 or Photograph No. 1, is taken from the South end of the switch looking North.

No. 2, is from the South end looking North from about the middle of the station, and No. 3 is from the North end of the switch looking South. Now I will ask you if a train coming North, a freight train coming North, found it necessary to take the siding at Cumberland City to let by a freight train that was standing in the clearance on the main line between the points of the switch, the North and the South points of the switch, and also to let by a South bound passenger train 103 that was short enough to occupy the clearance between the North and the South points of the switch, and that freight train, the North bound freight had entered the siding from the rear from the South, and found upon the siding a lot of freight cars, other cars, and the cars that were on the North bound freight added to
360 the cars backed up on the siding were longer than the siding, and it was necessary to saw by to let 115 by and also to let 103 by, tell the jury what would be the proper and careful manner or proceeding to accomplish that purpose and to let those trains by?

A. Freight train, North bound, would have pulled up until the South switch through which 103 passed was clear allowing 103 to pass, then they backed down sufficiently for 115 to come in as 103 had already done and push up on the main track North of the North switch, and clear the South switch and let 115 pass through that the same way and pull the box cars back into the siding and place them where they had been, if they need to be placed, and push out of the switch at the South end and close the switch for the main line and proceed on on the main line.

Q. Now say that 115 had passed and the North end of the main line immediately North of the siding was fouled so that it became necessary to back in for 103 to get in the clearance South of the switch point there and this train was standing still with the North end of the main line fouled, what should the conductor and flagman have done at the rear end, what would have been their duty?

(Objection by Att'ys for Def't. Obj. overruled, to which Att'ys for Def't except.)

A. The flagman should have gone to the South switch and have thrown the South switch to permit the rear of that train
361 to have backed through it on the main line and have cleared the North switch so 103 could have come down, on the main, and then pulled up again and cleared the South switch again.

Q. Now would it have been proper or careful under the Rules or customs of the Company for that Conductor in charge of that train to have given that engineer the signal to back that train to clear the North end with the switch at the South end of the siding set for the main line?

(Obpection by Att'ys for Def's. Obj. overruled, to which Att'ys for Def't except.)

A. According to the Rule a train is not to be moved against a switch until the switch has already been thrown.

Q. Whose duty is it to see that it is properly thrown and properly lined up?

A. The man who gives the signal should know before he gives the signal that the switches are in line for the movement of the train.

Q. Now say that the conductor in charge gives the signal to back up under these circumstances what is the duty of the engineer to do?

(Objection by Att'ys for Def't. Obj. overruled, to which Att'ys for Def't except.)

A. To obey the signal.

362 Q. After he gives the signal to back what is the duty of the engineer until he gets another one?

A. He gives the back up signal and obeys it until he gets another signal.

Q. And does that until he gets another?

A. Yes sir, he stops one and proceeds with the other.

Q. Now if the engineer watching the conductor giving signals and the conductor is in charge of the train, and another signal is given, whose duty is it to repeat them to the engineer, if anyone's?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. How is that?

Q. If he is moving in obedience to the conductor's signal, and a brakeman gives another signal, whose duty is that to repeat that signal to the engineer?

A. The conductor's, if the brakeman should give a signal.

Q. Now if a brakeman at another point in the yard gives a signal, whose duty is that to repeat that to the engineer?

A. The conductor's, if he is in a position to repeat it, or another brakeman who is in a position to repeat it.

Q. It is the duty of the engineer to watch the conductor for signals?

A. Yes sir.

Q. And he takes his signals from him?

363 A. Yes sir.

Q. I will ask you, say this train has pulled in for the purpose of letting 115 by and fouled the main track at the South end of the siding or it cleared the main at the South end of the siding and it is necessary to saw by, what was the duty of that flagman, what should he have done, where should he have been if he knew that that siding was not sufficient to hold the cars that were being moved?

(Objection by Att'ys for Def't.)

The above question is withdrawn by Mr. Procter.

Q. Say this train has pulled in on the siding, this North bound freight has pulled in, and they are handling more cars than the siding will accommodate, and they have pulled in the clear so as to let 115 by, the South point of the main and this train is starting back to back out for the purpose of clearing the North main so as to let another train by, what should that flagman do?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. That would necessitate the shifting of the switch at the South end and he should be there to shift the switch.

Q. You say he should be there to shift the switch for the siding?

364 A. Yes sir.

Q. And when the train backed through what should the flagman do?

A. He should swing on to the steps of the rear of the caboose and stand on the rear end as long as it was backing up and as long as it was exposed, if he didn't have to go back to flag according to Rule 99.

Q. Say that he was not at the switch but had left the switch and gone into the yard, and this engineer blew three signals in answer to a back up signal, when he heard those three signals what should he have done?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. He ought to have proceeded at once to the switch, knowing that the train was going to back up.

Q. Say he does not proceed back to the switch but he is so far from the switch that there is a possibility or even a probability that the caboose will go through the switch and split that switch, should he apply the emergency, or should he let that caboose go through the switch and split the switch, in your judgment?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. I think that would be a matter of judgment on the part of the flagman.

365 Q. What would be the effect of the caboose or the cars rolling through and splitting that switch?

A. It would not affect the cars or rolling stock at all.

Q. Would there be any danger of derailing the caboose?

A. It would bend the point of the switch rail and possibly straighten out the switch rods or bend the switch points.

Q. If he ran through and split or bent the switch point how long would it take to repair it?

(Objection sustained.)

Q. What would the damage be?

A. It would be small, it could be repaired in a very short time if they had a hammer or a maul with a few licks it could be knocked in shape again.

Q. What is the danger in applying the emergency to freight trains going back at the rate of 1½ miles an hour?

A. Just about like striking a bumping post, because the application when a car is moving at about 1½ miles or two miles every car stops that quick. (Indicates.)

Q. What is the danger in stopping a car like that?

(Objection sustained.)

Q. What is the effect?

A. Just a shock.

Q. What is the danger to persons about the train or to the property on the train in making such applications?

366 (Objection sustained.)

Att'y for Pl'ff makes the following avowal: We expect the witness to state that it would be dangerous to apply it and liable to hurt people on the train and damage property and pull out drawheads and injure property on the train.

(Cross-examination by Jas. C. Sims, att'y for def't:)

Q. You haven't railroaded for a long time have you?

A. Not since 1905.

Q. And up to that time you had been conductor between Bowling Green and Louisville?

A. Yes.

Q. For quite a while?

A. Possibly fifteen years.

Q. You had not been in Cumberland City for 30 years back?

A. I think it has been longer.

Q. You never did run on the Memphis line?

A. Oh, yes sir, I run baggage and broke on the Memphis line.

Q. How long ago?

A. About thirty years ago.

Q. If the conductor gives a signal on the siding for a train to back, and he begins to back, and receives a signal from a brakeman from the rear end of the train to stop, shouldn't he obey that signal?

A. Yes.

367 Q. It would be his duty to obey it?

A. I don't know that he should after the signal given by the conductor, in that event the conductor should repeat.

Q. And if the conductor is not in a position to see or does not see the signal, then ought not the engineer to obey the signal of the flagman at the rear end of the train?

A. Yes sir.

Q. How long since you run on a freight train, since you broke on a freight train?

A. I was on the Louisville Southern.

Q. I mean for the L. & N.?

A. It has been 25 years I guess, I don't remember.

Q. They had not gotten the air-brakes 25 years ago?

A. I don't believe they had.

Q. They had no air-brakes at all?

A. That is my recollection.

Testimony of J. F. Phelps.

(Direct examination by B. F. Procter, att'y for pl'ff:)

Q. Where do you live?
A. Richmond.
Q. How old are you?
A. Thirty-two.
Q. What is your occupation?
A. Farming now.
Q. Have you ever worked for the L. & N.?
368 A. Yes, sir.
Q. When, and how long?
A. From 1907 to 1909, and from May until August, 1913.
Q. From where were you running?
A. From Bowling Green to Nashville, Second Division.
Q. Have you ever run between here and Memphis?
A. Between here and Paris.
Q. When?
A. I only made three or four trips.
Q. Are you familiar with the siding at Cumberland City?
A. No, sir.
Q. What year?
A. It must have been 1908 or 1909.
Q. Are you familiar with the rules for switching and for air, and for the management of trains in September, 1908?
A. Yes, sir, fairly well.
Q. You have been examined on the use of air and on the rules and signals too, haven't you?
A. Yes, sir.
Q. Have you got a certificate of qualification?

(Objection sustained.)

Q. Say that a train, a north bound freight train with 33 or 34 cars, running from Paris to Bowling Green by Cumberland City, was required to take the siding at Cumberland City to let a freight train by, say 115, and that freight train was standing on
369 the main, and between the switch point, North and South switch point at Cumberland City, and there was an approaching South bound passenger train 103 that it had also to let by there, and this North bound freight train should find some cars upon the siding, and the cars that were in the train brought there to Cumberland City and the cars backed up on the siding were longer than the siding, and it became necessary to saw by, both for the freight train and the passenger train, tell what would be the proper and careful mode of operating that freight train so as to let those trains, freight and passenger, by South?

A. If the freight was on the main line, the North bound train would come on and head in and couple to the cars that was on the track and head through the switch at the North end far enough on the main line to clear the South switch points in order for 115 to

proceed, and then he would back in on the passenger track out through the South switch point and flag 103, if it was due, and let it down between the switch points, on the main line, and then railroad back through the switch, and close the switch in order for 103 to pass.

Q. Say after 115 had passed and gone South and the North end of the main line track was fouled by the cars that the freight train was handling, and it became necessary to back South in order to let 103 come in, and say further that the switch at the South end of the siding was set for the main, and the conductor wanted
370 to back his train on South so as to clear the fouled main, what should he do before giving a signal to back up?

(Objection by Att'ys for Def't. Obj. overruled, to which Att'ys for Def't except.)

A. Well he should know where his men was at, and know what he was expecting to do, and the proper places for these men.

Q. Would it be proper and careful railroading for a conductor under those circumstances to give a signal to back his train when the switch at the South end of the siding was set for the main track?

(Objection as to leading question. Objection sustained.)

Q. Now if the switch at the South end of the siding was set for the main track, and it was necessary to saw by, was it necessary to go through that switch or to have it thrown before he could get out on the South end?

(Objection by Att'ys for Def't. Obj. overruled, to which Att'ys for Def't except.)

A. It would be necessary to have it thrown or run through it, it would be necessary to have it open or run through the switch.

Q. What would be the conductor's duty if that switch was set for the main instead of set for the siding, before giving his signal to back his train, what ought he to do about that switch if anything?

371 (Objection by Att'ys for Def't. Obj. Overruled; to which Att'ys for Def't except.)

A. He should know that his flagman had the switch open before he backed out of the passenger track on the main.

Q. Should he give any signal until he knew that that switch was open?

A. No sir.

(Objection by Att'ys for Def't. Objection overruled; to which Att'ys for Def't except.)

Q. When that train passed into the siding and they had to saw by for 115, where should that flagman on that freight train have been, and what should he have done?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. He should have closed the switch and remained not nearer than 10 ft. of the switch until the train had passed out, and knowing that he had to saw by he should have opened the switch and let 103 go down the main line and should have protected the rear end according to Rule 99.

Q. Do you know the effect of making the emergency application, say if a train of 30 or more cars is backing at the rate of a mile and a half or two miles an hour, and the emergency application is made at the rear of the caboose, what effect would it have upon the cars upon that train?

372

A. It would be a very sudden stop or jar, it would be a pretty hard jar or jerk like hitting something solid, it would be quite a jar.

Q. Would there be any danger to men on the train, the engineer and the fireman and men about the train?

(Objection sustained.)

Q. What would be the effect upon the men and train crew?

A. It is likely to jerk out draw-bars or to jerk a person down or jerk him against something or jerk him off the train.

Q. What would be the damage you spoke of letting him run through the switch point, say that switch point was set and he ran through and split the point——

(Objection sustained.)

Q. What would be the effect upon the switch point?

A. It would open up the switch something like the width of the flange from the wheel.

Q. Would there be any danger of hurting anyone seriously in that sort of way?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys Att'ys for Def't except.)

373

A. That would be about the only danger to it, and it would cause a few minutes' delay, they would have to spike the switch back to the main line when they got through, and it would take about 10 or 15 minutes.

(Cross-examination by Jas. C. Sims, att'y for def't:)

Q. When did you commence railroading?

A. May 20th, 1907.

Q. Between what points?

A. Bowling Green and Nashville.

Q. In what capacity?

A. Brakeman and flagman.

Q. How long did you work at that time, May 1907?

A. Well, I worked until about November 26th or 27th 1909.

Q. As a brakeman?

A. Between Bowling Green and Nashville.

Q. And have you been braking any since?

A. I worked from May 1913 until the night of Aug. 8th 1913.

Q. As a brakeman?
A. Yes sir.
Q. And that is all the work you have ever done for any railroad?
A. No sir I worked for the M. K. & T. in Dennison, Texas, two years.
Q. Is that all the work you ever done for the L. & N.?
A. Yes sir.
374 Q. Did you ever run through a switch?
A. Yes sir.
Q. How many?
A. I believe down here in the Bowling Green yards, I was switching in the yards.
Q. You were not braking then?
A. I was not on the road then.

(Redirect examination by B. F. Procter, Att'y for Pl'ff:)

Q. How many times did you ever apply the emergency in all your railroading?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)
A. Never did.

(Recross-examination by Jas. C. Sims, Att'y for Def't:)

Q. Were you railroad brakeman?
A. I broke ahead and flagged too, I worked extra as flagman and filled out a flagman's form.

375 *Testimony of C. E. Gray.*

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. Where do you live?
A. Rich Pond.
Q. What is your occupation?
A. Fireman.
Q. How old are you?
A. Twenty-six.
Q. Have you ever railroaded any?
A. Yes sir.
Q. How long?
A. About a year.
Q. On what line?
A. Second Division main line.
Q. When did you quit railroading?
A. Last August.
Q. And your railroading then was the year prior to last August?
A. Yes sir.
Q. Are you familiar with the use of signals and air signals and backing and proper signals to be given, and proper applications of air in operating freight trains?
A. Yes sir.

Q. Now Mr. Gray I will get you to state between what points you run?

376 A. From Bowling Green to Nashville.

Q. Say a train approached the station at Cumberland City coming North and it was required of that freight train to take the siding to let by a freight train that already occupied the clearance between the North point of the switch of the siding and the South point, when this other train came up, and it was necessary further to let it remain on that siding until another train passed the South bound passenger train 103, and when this North bound freight arrived at this station it found on this siding several cars, and the cars that it was bringing North taken together with the cars that it found upon the siding were longer than the siding, and it became necessary to saw by so as to let 115 pass, and then to saw by and let the South bound passenger pass, what would be the proper and careful manner of operating that freight train, the North bound freight?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. The front brakeman should first throw the switch and let them pull in and the flagman should lock the switch and if they had to saw by remain in about 10 ft. of the switch until the freight train had passed, and go back and throw his switch and let the passenger train down the main.

377 Q. At the South end of the switch?

A. Yes sir.

Q. Would there be anything to indicate to that flagman on that train that it would be necessary to open that South switch after 115 had passed?

(Objection by Att'ys for Def't.)

The Court: "I don't understand."

Q. If it were understood that both the freight train and the passenger train were to pass this North bound freight, what should this flagman do there at that point?

(Objection by Att'ys for Def't. Objection overruled; to which Att'ys for Def't except.)

A. He should go back when the engineer blew the back up signal, go back and throw the switch, and let it back out on the main to let the passenger train drop on to the main line, if it was fouled at the North end.

Q. Say that this freight train had taken the siding there and had fouled the North end of the switch, that is the main track at the North end so 103 could not pass by without backing the freight train again and the conductor wanted the freight train backed so as to let 103 in, what signals should he give and what should he know about the condition of his track there before giving any signal to back?

378 A. He should know that that switch was open before he gives the back up signal to the engineer, if he was going to drop the passenger train down the main if it was fouled at the North end.

Q. Say, the conductor does not do this, and he gives that signal to back and the engineer is proceeding to back the train in obedience to the conductor's signals, and the switch at the South end of the siding is set for the main track, and this freight train would run through it unless it was changed, and the brakeman that was on there hadn't had time to open the switch and let the train through, should he let it split that switch, or put the train in emergency by angle cocking from the caboose?

The Court: "This witness has had mighty little experience to pass on that question, but I will let him answer."

A. I think it would be as much damage or more damage to put on the air, than to split the switch.

Q. What effect would it have if he split the switch?

A. It only presses it open far enough for the flange of the wheels to go through.

Q. How many times did you ever apply the emergency brake in your life?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. I never did apply it.

379 *Testimony of John Suttle.*

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. Where do you live?
A. Woodburn, Ky.
Q. How old are you?
A. Thirty-six.
Q. Did you ever railroad any?
A. Yes sir.
Q. Between what points?
A. Between Bowling Green and Nashville, and between Louisville and Nashville.
Q. What is your business now?
A. Merchant.
Q. How long since you railroaded?
A. Five years.
Q. You were railroading in 1908?
A. Yes sir.
Q. How long did you railroad you say?
A. Seven years.
Q. In what capacity?
A. Brakeman and Flagman.

Q. Freight or passenger?
A. Freight.
Q. Say that at a station say Cumberland City a North bound freight is required to take the siding to let by a South bound freight, and also a following passenger train, and when this
380 North bound freight takes the siding it finds other cars there and the cars that it has in its train taking in connection with the cars it finds upon the side track, are longer than the siding, too long to occupy the siding, and it becomes necessary to saw by first the freight and then a passenger, and the train is pulled in on the siding and the freight 115 is pulled South and has gone far enough South, and the North end of those cars have fouled the main so that it becomes necessary to back and the flagman or the conductor gives the engineer on the freight a signal to back down so as to clear the North point of the switch so the passenger could get in, and in obedience to that signal to back, the engineer blows three blasts of his whistle which is the signal to back, what is the duty of the flagman upon that freight train upon the siding?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. Well he should open the switch and go out to protect the rear of his train for his train to back out.

381 *Testimony of Mrs. Lon Hightower.*

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. Where do you live?
A. Bowling Green, Ky.
Q. Near Mrs. Stewart?
A. Three doors.
Q. How long have you known her?
A. For ten years ever since she married, for 12 years I have known her.
Q. Did you know Will Stewart?
A. Yes sir.
Q. What was the condition of his health before his death?
A. Well, he was a well man, never sick that I knew of, only when he had a spell of grip.
Q. How long was that before he died?
A. In March before he died that coming September.
Q. Aside from that did you ever know of him having any illness?
A. That was the first sickness that I knew of.
Q. Was he a delicate man?
A. He was a slender, tall man, but I never knew him to be sick, and I lived by him for ten years.
Q. Do you know the condition of his family since his death, who constitute his family?

(Objection sustained.)

382 Q. What amount of attention does that youngest child of Mrs. Stewart take now?

A. Why, she takes all of your attention.

(Objection by Att'y for Def't.)

The Court: "I don't think that would have anything to do with the amount of recovery, but the question of distribution, it might enter into that."

Att'y for Pl'ff makes the following avowal: "We expect the witness to state that this child takes all of her time and it is dangerous to leave her alone, and she is an imbecile."

(Cross-examination by Jas. C. Sims, Att'y for Def't:)

Q. You say he had an attack of grip in March 1908?

A. March before he died.

Q. That was in 1908, wasn't it? How long was he affected with the grip?

A. I don't know how long.

Q. Do you know of his being afflicted with appendicitis?

A. They did not fully decide it was appendicitis.

Q. Do you know how long he was sick?

A. No sir I don't know how long.

Q. That was the spring of 1908?

A. Yes.

383 Mr. Procter: "I have the deposition of Miss Reardon, made on the former trial before the jury, and she is out of the jurisdiction of the court, and a resident of the State of Tennessee. And here is the statement of Mrs. Sherrell also."

Rules 117, 69, 86, 119, 44, 104, and 133, and 117 *a* are here offered in evidence by Att'y for Pl'ff, to which Att'ys for Defendant object.

(The Court reserves his ruling for the present.)

(As to Rules, see page 186 of this transcript.)

Testimony of Dr. T. W. Stone.

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. Where do you live?

A. Bowling Green, Kentucky.

Q. What is your occupation?

A. Practicing physician and surgeon.

Q. You are a graduate of what school?

A. Vanderbilt Medical College.

Q. Where is that located?

A. Nashville, Tenn.

Q. When did you graduate from Vanderbilt?

A. 1893.

384 Q. Where have you practiced medicine since that time?

A. In Bowling Green except the first three years I was in Barren County.

Q. You have been practicing ever since your graduation?
A. Ever since.
Q. How long have you lived in Bowling Green?
A. Eighteen years.
Q. Did you know W. H. Stewart?
A. I did.
Q. How long had you known him prior to his death?
A. Possibly ten years.
Q. Were you his family physician.
A. I was.
Q. Were you called to see him or did you see him professionally about September 5th 1908, if so, tell the jury what service you gave him or what treatment you gave him and tell what condition you found him in?
A. He came to my office about that time suffering with his shoulder, neck and head and stating that he had received an injury——

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

on his shoulder and head, and on examination I found his neck stiff and also his shoulder, and I prescribed for him and he went away and was gone possibly two, three, or four days, and
385 came back again suffering the same way and possibly a little worse, and I again prescribed for him and he went away, and it seems that he came on the 23d of the month and at that time he was suffering from an *effacia* couldn't say what he wanted to, and pain in his head.

Testimony of Will Hagan.

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. Mr. Hagan, where do you live?
A. Bowling Green.
Q. What business are you engaged in?
A. Ice business.
Q. Got some that is melting now haven't you, Will?
A. About 1,500 lbs. down there.
Q. Where were you born?
A. Right up here where this business university is.
Q. What is your age?
A. Forty-four my next birthday.
Q. What experience have you had as a railroad man?
A. Half of my life.
Q. In what capacity have you served?
A. Switching, braking, flagging, and working on the section.
Q. Are you familiar with the rules for switching and for signalling in the operation of freight and passenger trains, in force Sept. 5th 1908 on the L. & N. R. R.?
386 A. Do you mean in regard to switching with air or switching without air?

Q. Handling air brakes and switching trains and moving trains and operating trains on sidings or main track either, with signals, and the duties of the men?

A. Yes sir, I think I ought to.

Q. When did you quit the service of the railroad?

A. Several years ago.

Q. How many years?

A. Let's see now, it has been seven or eight years, I can't recall now exactly.

Q. What places have you worked?

A. Bowling Green, Bowling Green Yards, and from Bowling Green to Paris Tennessee and from Bowling Green to Nashville, Tennessee, and from Bowling Green to Memphis, Tennessee, and from Evansville to St. Louis in Howell Yards and Evansville Yards and St. Louis and Little Rock, Ark.

Q. Are you familiar with the yards at Cumberland City, Tenn.?

A. Yes sir, it is not called a yard, just a siding.

Q. Are you familiar with that siding?

A. Yes sir I railroaded down there a right smart.

Q. I here show you three photographs marked 1, 2, and 3, and I will get you to state to the jury if those are correct photographs of that yard there and from what position they were taken and
387 how the camera was pointing or setting?

Mr. Sims: Did you make those photographs?

A. No sir I was present when they were made.

(Examination continued by Mr. Proctor:)

Q. Do you know these photographs to be correct?

A. Yes, sir. This is No. 1 here, that is the South end of the switch.

Q. How was the camera set, South of the switch point?

A. Yes sir.

Q. Turn to No. 2, where was the camera set for that?

A. This is what I call the middle picture there by the mill.

Q. Which way was the camera pointed?

A. North, showing North.

Q. Now No. 3?

A. This would show South.

Q. Is the main track straight from the switch point at the South to the switch point at the North?

A. Yes sir you can stand right here where this side track leads off here and see all the way through that track there with the train standing on the main track, you can see the switch until you get right to the switch stand at the North end, the track is straight all the way through there.

Q. Away beyond the passenger depot?

A. Yes sir away apast these cars here.

388 Q. There is a car there, where is that car?

A. Right even right North of the Operator's office and right even with the little freight office or platform.

Q. Does that also embrace the passenger depot?

A. Yes sir, the two story part is the passenger depot.
Q. How far is it from the siding to the passenger depot?
A. Now I can't recall exactly.
Q. About how far?
A. You mean from the siding to the main track?
Q. I mean from the nearest point of the siding opposite the passenger depot to the passenger depot, did you have to cross the siding to get to the passenger depot?
A. From the side track to the passenger depot is something like 6½ ft.
Q. Have you at any time at Cumberland City gone over the ground and made any measurements to ascertain the distance between those two points there?
A. Yes sir some time ago, with you.
Q. Before this former trial here?
A. Yes sir.
Q. How long before?
A. Just a few days.
Q. How far is it from the North end of that siding to the switch point where cars would be in the clear?
A. I have forgot, we measured that and I had that in my own figures, I have got it somewhere at home.
389 Q. Your best recollection?
A. From the switching point to clearing point?
Q. Yes.
A. It is something like One hundred and sixty some odd feet. Now that is just my judgment about it, it has been so long, I forget.
Q. To refresh your recollection didn't you say that to the point was about 110 ft.?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. My best recollection is that it was 160 some odd feet, but I can't say for sure.
Q. Do you remember whether or not there is a road crossing there in the photograph looking North there, does it show the road crossing in photograph No. 1?
A. Yes sir, here is the road crossing here of the South end.
Q. Have you any recollection now as to the distance from that switch point to that road crossing?
A. It is about 168 or 169 ft. somewhere along there.
Q. It is a little further than to the clearance?
A. Yes sir, there in only a very short distance in there from the frog to the crossing, it wouldn't anything like clear a half a car and clear the crossing.
Q. Now will you say you were familiar with that track there and familiar with the Rules, say that a North bound freight was
390 ordered, or it was necessary for the North bound freight to take that siding to let by 115 at Cumberland City, 115 was in the clearance there on the main, and it was followed by 103 a passenger train, and 114 the North bound freight had to take that siding

there to let both of those trains by, what would be the proper movement of that freight train that they had with the cars that were on the siding and the cars that was in the train, and it was necessary to saw by to let those trains by. How should the freight train crew manage or operate their train?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. It is just according to where you are working on this train. The head brakeman when that train approached that side track there and found that it had meeting orders to meet this train standing on the main and had the right of way of the track and this switch was not throwed for the side track, he should throw the switch right here and pull in this side track up here, stay on the head end of his train and come up here and couple on to these cars on the siding, and it was always the case when we were sawing by trains my conductor was up there, and to couple on to those cars in here and go on down here and open up this North end switch.

Q. Who would open that up?

391 A. The head brakeman, and I would be at the head end of this switch and let the rear end come into the clear until I got a signal from the rear end that my train was clear, and some one would throw this switch back here, the South switch, and after you got off this switch it is closed at the South end.

Q. Who closes that switch?

A. The flagman is supposed to close it.

Q. That is the rear brakeman?

A. Yes. And when this train pulls on out here and when 115 pulls out and goes on down South, the flagman opens this South switch here and our engineer would blow 3 blasts of the whistle, the back up signal, and back up and let 103 in on the main track.

Q. Back up far enough to let the North end get in the clear and let 103 in on the main?

A. Yes sir, and then when she gets into the clear, open up the North end switch, pull up into clear and the rear man shuts the South switch, closes it, and then lets 103 by, and then our engineer would blow back-up again and obey his signal and back up through South switch and place those cars where they belonged and back on up and throw the South switch for the main track and they are done.

Q. Now what would be the duty of the flagman on that train after 115 had passed and you had closed that switch as you say, or

392 he had opened that switch to let 115 out, what ought he to do then, the flagman to the rear?

A. For his train to back up?

Q. Yes.

A. He ought to go and open up this swtich so his train can back up and let 103 in.

Q. What position should he occupy, where should he be?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. Somewhere near this switch stand at a proper distance as the Rule provides for.

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

Q. What does the Rule provide?

(Objection sustained.)
The Court: "The Rule speaks for itself."

Q. What is the custom in managing that?
A. What the Rule is for that.

(Objection sustained.)
The Court: "You must introduce the Rule."

Q. I here show you Rule 117, was that Rule in effect at that time?
393 A. You will have to read it, I haven't my glasses, I know what it is though.

Rule 117 is introduced in evidence and here read to the jury by B. F. Procter, Att'y for Pl'ff, and is as follows:

"Whoever opens a switch shall remain at it until it is closed unless relieved by some other competent employe. When there is more than one train to use a switch, it must not be left open unless one of the trainmen of the following train is at the switch and takes charge of it."

Att'y for Pl'ff here offers to introduce and also read to the jury as evidence, 117 *a*, to which Att'ys for Def't object. Objection overruled by the Court to which Att'ys for Def't except.

Rule 117 *a* is here read to the jury by Mr. Procter, Att'y for Pl'ff, and introduced as evidence, which is as follows:

"Rule 117 (*a*). A train about to enter or leave a siding must come to a full stop before the switch is thrown, and no signal must be given to start the train until the switch is turned and the lock is secured through the hasp.

No attempt should be made to close a switch until the last wheels are off the switch rails. The person who locks a switch must grasp the chain and pull the lock to see that it is securely fastened, and, after having done so, must look twice at the switch rails to see that they are in their proper position. At meeting or passing points the employe attending the switch will, after locking it to main
394 track, take a position not nearer than 10 feet from the switch until the expected train has passed."

Q. Is that the Rule?
A. That is the Rule.

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

Q. Now Mr. Hagan, say that a brakeman has left the rear of his switch there at Cumberland City and has gone up into the station,

and the engineer blows the signal, 3 short blasts of the whistle indicating that he is going to back, what is the duty of that brakeman?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. The duty of that flagman would be, after the engineer blew the 3 short blasts of the whistle, to go South to the South switch and throw this South switch, and the engineer *and the engineer* should blow the back up signal.

Q. Now then say that he did not throw that switch and the engineer had started backing with this switch closed against him and the caboose would run through that switch, and he did not have time to throw that switch, ought this flagman to let the train go through the switch, or apply the emergency?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

395 A. I would let any train on earth back up through any switch before I would open the angle cock on any engineer.

(Att'ys for Def't move to exclude the above answer, which is overruled, and to which ruling Att'ys for Def't except.)

Q. What would be the damage in running through the switch?

A. Two switch points bent or sprung.

Q. How much would they be sprung?

A. There would not be but one switch point damaged to amount to anything, and that would be the right hand switch point the one that was out from the rail.

Q. How much would that be open?

A. It would be sprung near to the rail of the main track.

Q. How far would that be?

A. A space of about 3½ or 4 inches, it springs the switch point over to the main track.

Q. Just the width of the flange is it?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. Yes sir, one comes right against the rail and springs it over.

Q. How long does it take to repair that?

A. I never repaired one.

Q. Haven't you seen them repaired?

396 A. Yes sir.

(Objection by Atty's for Def't. Obj. overruled; to which Atty's for Def't except.)

Q. So train can go through?

A. Why this train, you can run through this switch as soon as you back up, get a spike maul out of the caboose. Anywhere from 4 to 5 minutes.

(Cross-examination by Jas. C. Sims, att'y for def't:)

Q. When was it that you were down there making the measurements that you gave Mr. Procter?

A. About 3 days before this other trial.

Q. When was that?

A. Something like three years ago, I don't remember exactly.

Q. You hadn't been at Cumberland City for some time before that?

A. Well I should say I have, I have been up and down that road *often* and on all my life.

Q. How long since you worked for the L. & N.?

A. Something like 10 years now.

Q. In what capacity were you working when you quit?

A. Switching.

Q. Where?

A. St. Louis, the last work I done.

Q. How long since you worked on the main line or Memphis line?

A. It has been 13 or 14 years ago.

Q. Who made those photographs you have in your hand?

397 A. An old gentleman down there at Cumberland City.

Q. What is his name?

A. I can't tell you, he run a photograph gallery there.

Q. He is not here today?

A. I don't know.

Q. You haven't seen him?

A. No sir nor I haven't seen anybody else until I came in here. Haven't been in the court house until I just come in here before I got on the stand.

Q. You say that the distance from the switch point South of that siding to a point North of the switch point where cars would be in the clear was about 160 ft.?

A. Yes sir, I told you I had this set down and when this trial was before it was refreshing to my remembrance, but since that I can't recall those measurements.

Q. Did he ask you on the former trial, and did you make this answer: "Q. How far is it from the switch point South of that siding to a point North of the switch point where cars would be in the clear? A. 110 ft." Did you make that answer?

A. I think it was.

Q. How far is it from the switch point at the South end of the railroad crossing to the first opening of that siding coming North? and to Mr. Procter you answered "180 ft.," is that right?

A. I don't understand your question.

Q. The question was this: "How far is it from the switch

398 point at the South end to the road crossing, the first upon that siding as you come North?" You say "Where you first hit the crossing?" Q. Yes sir. A. I never measured that but it is something like 120 ft." Did you make that answer?

A. Yes sir, I think I did.

Q. This time you said about 180 ft.?
A. Yes sir, I might have varied some on these measurements, for I told you that it ain't in my remembrance now like it was then, I have it at home.
Q. Who went with you to make those measurements?
A. Mr. Procter.
Q. How long ago?
A. Three days before this trial was before.
Q. And you think that was about three years ago?
A. Something like it.
Q. How long did you stay there?
A. Went down in the morning and came back that night.
Q. Didn't you say before in answer to the question, that you were there two days?
A. I see in that deposition it was, but we went in the morning and came back that night.
Q. Then if you answered on the former trial that you stayed two days, you were mistaken?
A. Bound to be.
Q. And you were examined then about three days after that?
399 A. Yes sir, I noticed that in my deposition there.
Q. When did you read that?
A. Just a few days ago.
Q. Where?
A. At lawyer Procter's.
Q. You read your statements at the former trial a few days ago?
A. Yes sir.
Q. At Mr. Procter's office?
A. Not at his office, up on his porch at his home.

The photographs No. 1, 2, and 3, are here introduced in evidence, by Att'y for Pl'ff, and are the same photographs as were introduced in evidence on former trial of this case. Att'ys for Def't object — the said photographs being introduced in evidence, which is overruled, and to which ruling the Att'ys for Def't except.

Testimony of Dr. T. W. Stone Continued.

Mr. Hagan being introduced by agreement of parties to continue the examination of Dr. T. W. Stone, after the testimony of Mr. Hagan.

Direct examination continued by B. F. Procter, att'y for pl'ff:)

A. On his third visit when I found him in this condition I then told him to go home and that I would call and see him during the evening, which I did, being called before that time however
400 by his wife and before I intended to go, and I went and found him partly paralyzed in his right side, and it progressed

during the evening and night until he was completely paralyzed in the right side, and remained so until his death.

Q. Did he tell you how he received this blow?

(Objection sustained, to which Att'y for Pl'ff excepts.)

Q. Did you make a diagnosis, or post-mortem after his death?

A. We made a post-mortem after his death, yes sir.

Q. Tell what condition you found him in?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. Upon examination we found on his left shoulder a previous bruise that at this time was getting to the yellow stage, and on opening the cranium we found the covering of the brain adhered to the cranium, and also the inner covering adhered to the brain. There was a considerable amount of bruising and some bloody serum in the ventricle.

Q. Did he receive any other injuries?

A. That is all.

Q. Did you examine the other functions or other organs?

A. We examined the whole chest and all the organs, and there was no disease we could find in kidneys, bowels, or stomach, and found no diseased tissue.

401 Q. Everything in a normal condition except the shoulder and brain?

A. Yes, except the shoulder and brain.

Q. Say that on Sept. 5th he had received an injury by being thrown against the side of the cab while acting as an engineer and he was in the condition you found him in on Sept. 6th and he had been in the condition you found him in at those other times you have stated, and then upon examination of his brain you found it in that condition, what would you say caused his death?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. The injury.

Q. The injury received by this contact with that cab?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. You mean by that the injury on Sept. 5th?

Q. In your judgment what caused that injury to his brain and shoulder, as to whether or not it was a tro-matic injury or otherwise?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. It was a tro-matic injury.

402 Q. What do you mean by that?

A. An injury caused by a blow or coming in contact with some substance other than the body.

Q. You had known him how long, before that?

A. Ten years at least.
Q. Had you doctored in his family?
A. I was his family physician and did all of his practice I take it.
Q. Tell the jury what was his condition prior to Sept. 5th, 1908?
A. Except an occasional complaint of external piles, or complaint of his stomach, he was in good health, he was not a robust man however. He did have an attack of grip, and then appendicitis in the spring and that ruptured without an operation and he got over it. That summer he seemed to be in better health than common, I never knew him to be in bad health although he was a slim made man.
Q. On a point of intelligence and industry?

(Objection by Att'ys for Def't.)
The Court: "He can state as to his habits for industry and sobriety, but the objection is sustained as to intelligence."

Q. What character of man?
A. He was a very industrious man and when he was not on the road he was always doing something about his place to make it look well, and he was a perfectly sober gentleman, I never knew
403 of him taking a drink in my life.

(Cross-examination by Jas. C. Sims, att'y for def't:)

Q. Dr., you remember exactly the first time in September you saw him?
A. September 6th my books show.
Q. He came to your office?
A. Yes sir.
Q. Where was your office?
A. At my residence on College Street.
Q. Where did he live?
A. On Clay street below the railroad.
Q. How far from you?
A. About six blocks or a little over.
Q. He walked to your office?
A. No sir, I think he came up on a grocery wagon.
Q. Anyone come with him?
A. No one came in the office.
Q. How long did he stay?
A. Possibly 30 minutes.
Q. You prescribed for him?
A. I did.
Q. What did you prescribe?
A. I don't remember, possibly the sedatives, and I ordered him to use something on the neck.
404 Q. You made no thorough examination of him?
A. I did.
Q. And found no outside indication of injury?
A. I found a bruise on his shoulder.
Q. No outward indication of injury to the head or neck?
A. He was complaining of pain, but no outward indication.

Q. When he left your office, he left walking?
A. Yes sir.
Q. When did you next see him?
A. I would say possibly four days after that, or five.
Q. Where did you see him that time?
A. At my office.
Q. By himself?
A. I don't know he was at the door before I knew he was coming.
Q. How long did he stay there the second visit?
A. Some 20 minutes the best of my recollection.
Q. Did you make any further examination?
A. Yes sir, I went over his head and neck again, and found his shoulder possibly not as sore as it was before, but his neck was more so.
Q. But no other outward indications?
A. No sir.
Q. Did you prescribe for him?
A. I did.
Q. Do you remember what?
A. Along the same line.
405 Q. Sedatives?
A. Yes sir.
Q. Something to relieve the condition?
A. Yes sir.
Q. Was he back at your office again after that?
A. I never saw him any more until the 23d.
Q. Where was it that you saw him on the 23d?
A. In the morning at my office.
Q. Did he come by himself?
A. Yes sir.
Q. Walking?
A. I do not know.
Q. How long did he stay at that time?
A. A very few minutes, not more than five minutes.
Q. Then he left alone, and when did you next see him?
A. That afternoon at his home.
Q. That was the time you say he was partially paralyzed in the right side?
A. On the morning visit at my office he was partially paralyzed because he could not speak like he wanted to but his hand and foot were not paralyzed, and he went home and went to bed and followed my orders, I told him that I would come after supper, but his wife called me in the middle of the afternoon I think.
Q. Did you see him any more after that?
A. I saw him again after supper, and three or four times a day until his death.
406 Q. At the time you are speaking of was the 23d before he died when?
A. On the 27th.
Q. That was on Sunday?
A. I don't recollect.

Q. You spoke of a post-mortem in answer to Mr. Procter, that was an autopsy?
A. Yes sir, one and the same thing.
Q. Who was present at that autopsy?
A. Dr. Huddle, Dr. Meredith, Dr. McCormack, Dr. Reardon and myself.
Q. They are all physicians here in town and all live here now?
A. Yes sir.
Q. Was the railroad surgeon present?
A. He was not.
Q. And no representative of the Railroad Company present?
A. No sir.

Testimony of Dr. A. T. McCormack.

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. Where do you live?
A. Bowling Green.
Q. How long have you lived here?
A. All my life, ever since I was four years old.
Q. How old are you now?
A. Forty-one past.
407 Q. Are you a graduate of any school of medicine?
A. Graduate of Medical Department of Columbia University in 1896, and no other medical schools.
Q. Have you taken degrees in other schools?
A. Have taken post-graduate courses in other schools, in New York, Philadelphia, Chicago and Rochester.
Q. What experience have you had in surgery in a hospital?
A. I was the attending surgeon in Bellevue Hospital in Paterson, New Jersey and since then have done all I could in Bowling Green, was in Paterson, N. J., in 1896 and 1897.
Q. What hospital have you had in Bowling Green?
A. St. Joseph's Hospital.
Q. Did you assist in the autopsy on W. H. Stewart?
A. Yes sir.
Q. Do you remember who was present?
A. Dr. Reardon, Dr. Stone, Dr. Huddle, and I don't remember who else.
Q. Was Dr. Meredith there?
A. Yes sir.
Q. I will get you to tell the jury if you reduced to writing the result and tell what you found?
A. I did reduce the result to writing.
Q. What did you find?
A. Can I have that report to refresh my memory?
Q. Just tell in your own way what you found on that autopsy and when and where it was held?

(Objection by Att'ys for Def't. Obj. overruled, to which Att'ys for Def't except.)

408 A. It was held on September 28th 1908. This is written technical. There was a bruise and some swelling on the left shoulder in here. The top of the head, the skull was opened and the top of the head taken off and the outside skin of the brain, in it was found a large amount of bloody serum in the left side, the inner skin was very much congested and showed a sort of gluey condition that attached it to the brain substance along over the centers of motion of the left side. Then the brain was removed and sections made through it, and in the left ventricle there was a lot of bloody serum, and the right side of the brain was normal, and it was the opinion of the five doctors present at the autopsy——

(Objection sustained.)

It was my opinion that the cause of death was injury to the left side of the head.

Q. Say he had received an injury on the left side of his head by being thrown against the cab window, and you had found his head as you found it there, what would you tell the jury was the cause of his death?

(Objection by Att'ys for Def't. Obj. overruled, to which Att'ys for Def't except.)

A. Caused by that injury if that was the only one he had sustained, caused by an injury to the left side of his head. Dr.
409 Stone stated the history of the case at the autopsy, of course we could not have based it without that history.

Q. How long had you known W. H. Stewart?

A. We went to school together in the public schools.

Q. Tell the jury what sort of man he was?

(Objection.)

Q. From point of health?

A. He had always been a very healthy man, I had done practice for every member of his family but him. He had had a spell of illness, but he was a strong, healthy, spare made man, a hard working boy or man, a very healthy man as far as I knew. I did practice for his sister and his mother, and saw him frequently, he always paid the bills.

Q. From a point of sobriety and morality?

A. He was all right, a hardworking, industrious boy, and sober and a good husband and father.

(Att'ys for Def't move to exclude the latter part of the above answer from the jury as to his being a good husband and father. Objection sustained.)

Att'ys for Pl'ff here offer to introduce the American Life Tables from book, to which Att'ys for Def't objected, and the Court ruled that they should put the witness on the stand to introduce said tables.

410 The testimony of Miss Reardon as taken down upon the former trial of this case, is here introduced in evidence, and read to the jury by Att'ys for Pl'ff. Att'ys for Def't objected to the

introduction of said testimony in evidence and to the reading of same to the jury, which is overruled, and to which ruling Att'ys for Def't except.)

Also the testimony of Mrs. Sarah A. Sherrell as taken down upon the former trial of this case, introduced in evidence by Att'ys for Pl'ff, and read to the jury.

Testimony of Mrs. W. H. Stewart, Recalled.

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. Mrs. Stewart, what is your age now?
A. Thirty-three.

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

Testimony of Geo. H. Galloway.

For the Purpose of Introducing the American Life Tables.

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. Have you ever had any experience in Life Insurance?
A. Yes sir, some.
Q. Have you ever been a Life Insurance Agent for any standard Company?
A. Yes sir.
411 Q. Are you an agent for any Standard Company now?
A. No sir.
Q. Are you familiar with the Tables of Mortality as shown for expectancy of life, as shown by the Carlyle or other standard tables?
A. Yes sir I think so.
Q. Tell what the expectancy of life is of a man 34 years of age?
A. 28.62 years.
Q. If he is 34 years of age the expectancy of life is how much?
A. 28.62 years.

(Cross-examination by Jno. B. Rodes, Att'y for De'f:)

Q. From what table, Mr. Galloway, did you read?
A. I read from table known as the Wiggleworth Table.
Q. Is that a table of American mortality?
A. I can't tell you whether it is or not, I never looked into it.
Q. May it or not embrace English mortality?
Q. Yes, it may.
Q. You don't know about that?
A. No sir, it does not embrace English, only United States.
Q. Only American mortality?
A. Yes.
Q. Isn't it a fact that those tables are based on the experience as to the general average of the lives of men in all occupa-
412 tions?
A. Yes sir, it is not confined to one occupation.

Q. It is not confined to the business of railroading?

A. No sir.

Q. The business of railroading is an extra hazardous occupation, is it not?

A. I think so.

Q. The expectance of life of that peculiar class of men engaged in railroading, based on a general average, would be less than the table based on the expectancy of life of men engaged in all occupations?

A. Yes sir, it would be.

(Redirect examination by B. F. Procter, Att'y for Pl'ff:)

Q. Isn't it true that the expectancy of life according to the American Mortality Tables, and the experience in the life statistics, shows that the age of men is increasing owing to sanitary conditions and other conditions at the present time?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. Well, I have heard some such statements as that.

Q. As a matter of fact doesn't Judge Hobson say so in the Houchins case and other cases that the expectancy of life is prolonged?

(Objection sustained.)

413 Rules 117, 117 (*a*), 86, 104, and 133, from the Revised Rules for the Government of Transportation, &c., are admitted in evidence. The Court sustains the objection to the introduction of Rules 69, 119 and 44, in evidence.

Rules 117, 117 (*a*), 86, 104, and 133 are read as follows:

Rule 117.—Conductors will be held responsible for the proper adjustment of the switches used by them and their trainmen; except where switch tenders are stationed. Whoever opens a switch shall remain at it until it is closed, unless relieved by some other competent employe. When there is more than one train to use a switch, it must not be left open unless one of the trainmen of the following train is at the switch and takes charge of it."

Rule 117*a*.—A train about to enter or leave a siding must come to a full stop before the switch is thrown, and no signal must be given to start the train until the switch is turned and the lock is secured through the hasp. No attempt should be made to close a switch until the last wheels are off the switch rails. The person who locks a switch must grasp the chain and pull the lock to see that it is securely fastened, and, after having done so, must look twice at the switch rails to see that they are in their proper position. At meeting or passing points the employe attending the switch will, after locking it to main track, take a position not nearer than ten

414 feet from the switch until the expected train has passed.

Rule 86.—When a train of inferior class meets a train of superior class on single track, the train of inferior class must take the siding and clear the train of superior class five minutes. A

train of inferior class must keep ten minutes off the time of a train of superior class following it."

Rule 104.—When a train is being pushed by an engine (except when shifting and making up train in yards) a flagman must be stationed in a conspicuous position on the front of the leading car, so as to perceive the first sign of danger and immediately signal the engineman.

Rule 133.—The general direction and government of a train from the time of receiving its passengers or freight until its arrival at its destination, is vested in the conductor. He is held responsible for its safe and proper conduct, and all men employed on the train are required to yield a willing obedience to his proper orders.

Testimony of H. T. JONES, recalled for further cross-examination, to which Att'y for Pl'ff objects. Objection is overruled, and Att'y for Pl'ff excepts.

(Direct examination by Jno. B. Rodes, Att'y for Def't:)

Q. Mr. Jones, you stated to Mr. Procter, if I understood you correctly, that as you stood there at Cumberland City after giving the signal to the engineer to back the train, that the entire train
415 was within your vision?

A. Yes sir.

Q. As you stood there and as the train backed, were you in a position to then and there locate the position of the caboose?

A. Yes sir.

Q. Were you then able from where you were to tell the locality of the caboose with reference to the South switch?

A. Approximately, yes sir.

Q. Within what number of feet in your judgment would you have been able to locate the caboose from where you stood?

A. Within at least 20 ft.

Q. Were you or not from that position able to protect the switch from the caboose or vice versa?

A. Easily.

Q. Have you a Time Card?

A. Yes sir.

Q. What do you mean by the Time Card?

A. Just a printed form showing the schedules of all regular trains at all stations.

Q. Have you the last Time Card?

A. Yes sir.

Q. Issued to Conductors upon your Division?

A. Yes sir.

Q. Will you let me see it?

A. Yes sir.

416 Q. Is that sometimes called a Time Table?

A. Yes sir.

Q. What number is this?

A. 114.

Q. And went into effect when?

A. January 8th 1914 at 7 o'clock P. M.
Q. And is in effect now?
A. Yes sir.
Q. State whether or not you and all other conductors on your Division operate on that time table?

Mr. Procter: "We object to that, the Time Table in effect September 1908 is what we want."

Q. State whether or not the time table issued by the Company and which you have exhibited to me shows the stations from Memphis Junction on South through and apast Cumberland City, and the car capacity of the sidings or sidetracks along said stations, based upon 40 ft. per car?

Mr. Procter: "We object unless he gets the Time Table that was in effect at this time."
Objection is overruled, to which Att'y for Pl'ff excepts.

A. Yes, this Time Table shows the car capacity of the Cumberland City siding based upon 40 ft. per car.
Q. What was the car capacity of that side track at Cumberland City, and what is it now?
A. 41 car lengths.
Q. Based upon 40 ft. to the car, is that correct?
417 A. Yes sir that is correct.

The Time Table is here introduced in evidence, and marked Exhibit X and filed herewith, or those portions thereof showing its number, its time of issue, and when it went into effect upon the first page thereof, and showing the car capacity of passings sidings based upon 40 ft. per car at Cumberland City.
Att'ys for Pl'ff object to said Time Card being introduced, which is overruled, and to which Pl'ff excepts.
Att'y for Def't reads those portions introduced, to the jury, as follows:—
Time Table between Memphis Junction and Paris, North Bound Cumberland City Car capacity of passings siding based upon 40 ft. per car, 41 cars.

Q. How long have you been operating on that Division, Mr. Jones and running as conductor?
A. I was promoted on this Division in 1903.
Q. And have been since that time on that Division?
A. Two or three years ago and possibly longer we have been operating both ways from Paris.
Q. You have passed there frequently?
A. Yes sir.
Q. Independent of that Time Table what is your best
418 judgment of the car capacity of that siding based upon 40 ft. to the car?
A. I think that is correct, 41 cars.
Q. At times the capacity varies according to the length of your car, some cars are 50 ft. long, and the capacity on each occasion is

governed by the number of cars in the train, the average would be 40 ft., but some go over that.

Q. That would be the average 40 ft. per car?

A. Yes sir.

Q. What do you operate your trains by, that Time Table or Time Card?

A. Yes sir, that Time Table.

Q. When you are actually on the road, do you or not carry one with you?

A. Yes sir.

Q. In the actual operation of your train?

A. Yes sir.

Q. Mr. Procter showed you yesterday a book showing the list of stations and names of agents of the L. & N. Railroad Company at Cumberland City, and the name of C. T. Jacobson Agent, and a column showing the clearance length of siding as 720 ft. opposite the name Cumberland City, state whether or not at that time and now that is a mistake?

A. That is an error.

Q. No question about it?

419 A. No sir.

(Redirect examination by B. F. Procter, Att'y for Pl'ff:)

Q. What was the capacity of that siding there in 1906 or first of January 1907?

A. I would have to refer to the records to give that accurately.

Q. Give your best judgment?

A. I don't remember when that siding was extended.

Q. That siding has been extended?

A. Yes sir, it was originally much shorter, it was supposed to clear 18 cars.

Q. You don't know when that change was made?

A. No sir.

Q. I show you here Time Table No. 86 that went into effect December 2nd 1906 at 6 P. M., and I will get you to examine that and state if that Time Table does not fix the capacity of that siding there at 18 cars?

(Objection by Att'ys for Def't. Objection overruled; to which Att'ys for Def't except.)

A. Eighteen is right, on this card.

Q. And I understand you don't know when that change was made?

A. No sir, I have no accurate information when the change was made, we are notified when each change is made.

Q. I am not asking you about that.

Att'y for Pl'ff reads Time Table 86 to the jury as follows:—"Car capacity of passing siding based on 40 ft. per car, 18. Time

420 Table No. 86 Memphis Line takes effect Sunday December 2, 1906 at 6 P. M."

Said Time Table is here introduced in evidence, & marked "Exhibit Y" & filed herewith.

(Objection by Att'ys for Def't. Objection overruled; to which Att'ys for Def't except.)

(Recross-examination by Jno. B. Rodes, Att'y for Def't:)

Q. Mr. Jones you said to Mr. Procter that that siding had been extended?

A. Yes sir.

Q. Formerly you recollect its capacity was 18 cars?

A. Yes sir.

Q. And that is just what shows isn't it?

A. Yes sir.

Q. The old siding was 18 cars and was extended to hold a larger quantity of cars?

A. Yes sir.

Q. In your judgment did that siding hold in 1908 just what that time table shows, and holds the same now?

A. It held the same in 1908 as it does now.

Q. Was or not that extension you have referred to, prior to 1908?

A. Yes sir.

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

421 At the close of the testimony for Plaintiff, Att'ys for Def't moved the Court to peremptorily instruct the jury to find for Defendant, which motion is overruled by the Court, and to which ruling Defendant excepts.

Testimony for Defendant.

Testimony of J. H. Kelley.

(Direct examination by Jno. B. Rodes, Att'y for Def't:)

Q. Your name is J. H. Kelley?

A. Yes sir.

Q. Where do you live?

A. Cumberland City.

Q. Tennessee?

A. Yes sir.

Q. What is your position with the L. & N. Railroad Co.?

A. I am track foreman now.

Q. How long have you held that position?

A. Since about the 7th day of February 1893.

Q. Mr. Kelley do you know the length of that siding at Cumberland City?

A. Yes sir.

Q. Have you measured it recently?

422 A. Yes sir I measured it yesterday evening.

Q. And come up here when?

A. On 104, got here about 5 o'clock.

Q. What does that siding measure from the North switch point to the South switch point?

A. 1977 ft. by the tape line.

Q. What in your judgment would be the car clearance measuring that distance?

A. I never figured on it but I think about 41 cars.

Q. Was there ever an old siding there before this new one was made?

A. Yes sir.

Q. Was that old siding shorter or longer than the present one?

A. It was shorter.

Q. Are there any marks there to show you where the old switch stands were?

A. There is no marks to show where the stand is, but there is one where the frog was made, where it entered the main.

Q. Have you measured how long it was where the marks showed it entered the main track?

A. Yes sir.

Q. How long was the old siding?

A. 1028 ft.

Q. By your measurement?

A. Yes sir I measured from where the frog was to the switch point at the South end of the old siding, I then measured from
423 the switch point at the south end of the old siding to where the frog sets on that end and that gives me a distance, I won't say positive as to the number, but it is about 1,028 ft.

Q. What would be the car clearance of that old siding?

A. About 16 cars, somewhere along there, I never figured on it, I couldn't state as to the clearance.

Q. Can you state the time when that siding was extended and made longer?

A. I can't state positively, it has been seven or eight years ago, I don't recollect the exact date.

Q. What effect would a train running through a closed switch have?

A. Why sometimes a serious effect, and sometimes it doesn't hurt it very bad, we have had in one particular case where it ruined the switch stand and didn't hurt the points, it bent the rod that runs through the switch stand, and it took me and my men pretty near all day to locate the trouble, and sometimes it will spring it pretty bad and sometimes not so bad, it is owing to how bad the points are worn.

Q. Is there any effect on the rail?

A. The switch points are bent and frequently so you have to take them out and heat them and straighten them.

Q. Is there any probable effect to the cars themselves?

A. Yes sir it is probable for them to get off but they don't always do. I have heard of it, I never saw it.

424 Q. Should that happen, state whether or not there would be any delay to traffic or any trouble in getting traffic on its usual course again?

A. Yes sir because if it is at a point where it is connected with the main line track, it is delayed until those cars are put on again, it can't pass.

Rule 154 is here introduced in evidence, under the title "Rules for Conductors, Flagmen, Brakemen and Train Porters", by Att'y for Def't, and same is read to the jury as follows:—

Rule 154. They will see that their trains do not obstruct any public street or road-crossing more than 5 minutes at one time.

Testimony of Dr. Sanders.

(Direct examination by Jno. B. Rodes, Att'y for Def't:)

Q. What is your profession?
A. Dentist.
Q. How long have you been practicing in Bowling Green?
A. Have been here nearly six years, six years next September.
Q. Did you ever live in Tennessee?
A. Yes sir, all my life.
Q. Are you familiar with the surroundings at Cumberland City of the tracks of the L. & N. Railroad Company?
A. Yes sir.

Q. Was there ever an extension of the side track at Cum-
425 berland City?

A. Yes sir.
Q. Do you remember that it was made longer?
A. Yes sir.
Q. About how much longer than the old side track was it made?
A. I think about twice as long, a good deal longer.
Q. Was it extended before 1908?
A. It was before I left there and I left in 1908.

(Cross-examination by B. F. Procter, Att'y for Pl'ff:)

Q. When was your attention called to that? When did you leave there?

A. I left there, I never lived there, I lived in Erin, and I left Erin in 1908, I went to Cumberland City once a week.

Q. When was your attention first called to that?

A. I happened to be coming down town a few minutes ago and I spoke of you having asked me if I knew Mr. Kelley, and he asked me if I knew when that track was changed and I told him I did, and he said he would have me summoned, I have known Mr. Kelley 20 years.

Q. Your attention was never called to it before?
A. I didn't know a thing on earth about it.

(Redirect examination by Jno. B. Rodes, Att'y for Def't:)

426 Q. What did he ask you about Mr. Kelley?

A. He asked me what kind of a man Mr. Kelley was, and I told him he was straight and all right, a mighty nice gentleman.

Testimony of Mr. L. T. Becot.

(Direct examination by Jno. B. Rodes, for Def't:)

Q. What are your initials?
A. L. T.
Q. How old are you?
A. Fifty-two.
Q. Where do you live?
A. Paris, Tennessee.
Q. Are you in the employ of the L. & N. Railroad Co.?
A. I am.
Q. What position do you hold?
A. Chief Clerk in F. J. Monahan's, Master Mechanic's office.
Q. I will get you to tell the jury what the monthly earnings of W. H. Stewart was from January 1908 to September 1908, month by month?
A. The month of January $150.44. February, $6.10. March $9.00. April $12.20. May $69.15. June $67.10. July $66.10. August $116.36. Sept. $68.70 that is up to the last trip he made on the 16th *od* September.

427 The Court: "On reflection the Court excludes from the jury all testimony relating to the attitude of decedent towards his family, his conduct in and about his home, and all other testimony relating to his habits, except as to his habits for sobriety and industry, and the testimony in that regard is to be considered only as affecting his power to earn money.

To the above ruling of the Court, Plaintiff and Defendant except.

Counsel for Defendant moves the Court to now discharge the jury and continue the case for another trial. Motion is overruled, to which Att'ys for Def't except.

Counsel for Def't again moves the Court to peremptorily instruct the jury to find for Def't, which motion is overruled, and to which ruling, Att'ys for Def't except.

428 COMMONWEALTH OF KY.,
County of Warren, set:

I, Belle Galloway, Official Stenographer for the Warren Circuit Court, do certify that the foregoing transcript is a true and correct copy of all the evidence introduced and heard and offered to be introduced and rejected, and all exceptions, objections, and avowals, concerning the same as well as all papers and exhibits offered to be or used as evidence in the trial.

Witness my hand this Oct. 20th, 1914.

BELLE GALLOWAY,
Official Stenographer, Warren Circuit Court.

Stenographer's Fees.

1914.
Oct. 20, To copying transcript of testimony—203 pages at 25¢ each $50.75
To carbon copy—203 pages at 5¢ each..... 10.15

Total..... $60.90

Examined and approved in open court this 2 day of November, 1914.

McKENZIE MOSS,
Judge Warren Circuit Court.

428½ The following endorsement appears on the transcript of the record on the second appeal in this case:
"1914, December 8th, Old Record of same style placed with this appeal."

429 The following is a judgment of affirmance of the Court of Appeals entered herein on the 26th day of March, 1915:

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
WILLIAM H. STEWART'S ADMINISTRATRIX, Appellee.

Appeal from Warren Circuit Court.

The court being sufficiently advised it seems to them there is no error in the judgment herein.
It is therefore considered that said judgment be affirmed and that appellee recover of appellant 10% damages on the amount of the judgment superseded herein. Which is ordered to be certified to said court.
It is further considered that appellee recover of appellant her costs herein expended.

430 The following is the opinion of the Court of Appeals delivered on March 26th, 1915:

431 Court of Appeals of Kentucky, March 26, 1915.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
WILLIAM H. STEWART'S ADMINISTRATRIX, Appellee.

Appeal from Warren Circuit Court.

Opinion of the Court by Judge Hannah, Affirming.

William H. Stewart, a locomotive engineer in the service of the Louisville & Nashville Railroad Company and engaged in interstate

commerce, was injured at Cumberland City, Tenn., on September 5, 1908, and died on September 27, 1908, as the result of his injuries. His widow was appointed administratrix of the estate, and she instituted this action in the Warren Circuit Court to recover damages for the negligent killing of her husband and intestate, for the benefit of herself and four children.

There was a verdict and judgment in her favor, which upon appeal was reversed. See 156 Ky., 550, 157 Ky., 642; 161 S. W. 557, 163 S. W. 755.

Upon the return of the case to the circuit court, there was a second trial, which resulted in a verdict and judgment in plaintiff's favor in the sum of $11,885, apportioned as follows: to the widow and the three older children, $2,472 each, and to the young-
432 est child, $4,469. The railroad company again appeals.

Stewart was the engineer in charge of the locomotive of a freight train proceeding northward on the day mentioned. Jones was conductor of the train, and Hill rear brakeman. On reaching Cumberland City, they met a south-bound freight train, which was standing on the main line just north of the switch at the south end of the passing track. Stewart's train entered upon this passing track at the south switch thereof and proceeded north thereon, pushing ahead of the locomotive several cars which were found standing on the passing track. On reaching the north end of the passing track, it was found that the rear end of the train was not yet in the clear at the south end of the passing track, and in order to let the south-bound train which was standing on the main line proceed, they opened the switch at the north end of the passing track and pulled the front end of the train out on to the main line. After this was done and the southbound freight train had gone, it was necessary to arra-ge for a south-bound passenger train which was approaching Cumberland City. Jones, the conductor, gave to Stewart, the engineer, a signal to back up. This was done while the front end of the train was out on the main line, the purpose of backing the train being to clear the north end of the passing track so the passenger train could pass on the main line. While the train was backing, Hill, the rear brakeman, applied the air-brakes suddenly by opening an angle-cock, causing Stewart's head to strike a portion of the cab, whereby he sustained the injuries from which it was claimed his death resulted.

433 On the first trial of the case, the testimony of the conductor Jones was not available, but the rear brakeman testified; and in the opinion on the former appeal based upon the evidence as it then appeared, the court held that there was sufficient evidence of negligence upon the part of the conductor to take the case to the jury; but that Hill, the rear brakeman, was not negligent.

The conclusion- stated in the former opinion based upon the evidence then appearing, were that under the rules the rear brakeman properly locked the south switch after his train had passed onto the passing track; that he properly went toward the front of the train for the purpose of cutting a crossing which was blocked by the train; and that when the train began to back, finding that he did not have

time to reach the south switch and throw it, he properly stopped the train by opening the angle-cock. And, that as to the conductor, he gave the order to back the train when he knew or should have known that the switch was locked, that the rear brakeman had to attend to the cutting of the blocked crossing and was therefore absent from the switch, that his train was too long to be in the clear at both ends of the passing track at the same time, and that when he backed it far enough to be in the clear at the north end, it would run out on to the main line at the south end, and that therefore the conductor was negligent, or at least there was sufficient evidence of negligence on his part to take the case to the jury.

434 On the second trial, however, Jones, the conductor, was present and testified, and a different state of facts was presented.

Jones testified that the length of the passing track was 32 to 34 car lengths; that he had thirty three or thirty four cars in his train; that when he gave the signal to back he could see both ends of his train; that it was not his intention when he gave the signal to back, to leave the siding, that is, for the rear end of the train to pass out on to the main line; that in his judgment he could have backed the train far enough to have cleared the main line at the north end of the siding without backing the caboose of the train as far as the south switch thereof. It is shown in the record that the train could have backed something over a hundred feet after the caboose would reach the point where it would foul tne main line, before coming to the switch itself; and that there was approximately forty feet of "slack" in a train of that length which could be taken up. In addition, it is not shown how far out on the main line at the north switch the train was; so that under the evidence as presented on the last trial it is not beyond the possibilities that the conductor could have cleared the main line at the north switch without backing the caboose over the closed south switch.

435 But, it is to be noted that the conductor testified that he had to "saw by" the south-bound freight train which they met at Cumberland City; and if this was absolutely necessary, that is, if his train was so long that the front end of it had to be run out on to the main line at the north end of the passing track in order that the rear end of the train at the south end of the passing track would clear the main line, then it would necessarily follow that to clear the main line at the north end of the passing track, the rear end of the train would have to be backed out on to the main line at the south end thereof. The record, however, does not conclusively establish such to be the fact. In pulling his train up on the passing track, it was pulled far enough to clear the first crossing to the north of the south switch, and possibly farther, the evidence is not clear on this point; but it may not have been very far out on the main line at the north end of the passing track, and its length may have been such that it could have all been placed on the passing track, clearing the main line at the north end, and without the rear end extending past the south switch.

436 So that the testimony of the conductor presented an entirely different state of facts from those obtaining on the first trial, and upon which the opinion on the former appeal was based; and upon the second trial, there was some evidence of negligence upon the part of Hill, the rear brakeman, in acting too hastily, and in assuming that the purpose of the conductor was to back the rear end of the train over the closed south switch, or that it would be necessary to do so in order to clear the main line at the north switch.

Realizing that the negligence which caused the injuries of the engineer was either that of the conductor or of the brakeman, depending upon the view-point, the court instructed the jury that if the defendant's agents and employees in charge of its train, or any of them, negligently operated it so as to cause Ste-art's injuries, they should find for the plaintiff; and also gave an instruction dealing especially with the alleged negligent act of the rear brakeman, Hill, in opening the angle-cock and applying the brakes in that manner.

Of this appellant complains insisting that as the court held in the opinion on the former appeal that Hill was not negligent, it was error to instruct in regard thereto. But as we have heretofore explained, the evidence in respect of these matters was radically different upon the second trial, and of course, the instructions vary as the facts vary.

2. Plaintiff administratrix testified for herself upon the trial, and while doing so, held in her lap her youngest child. This child was six years of age, and afflicted in mind. Defendant objected
437 to the exhibition of this child before the jury, and at the conclusion of plaintiff's examination in chief moved the court to discharge the jury and continue the case on account thereof; and it is contended here that the court erred in permitting this child to be exhibited before the jury, and in admitting evidence concerning its mental condition.

Appellant contends that the verdict is excessive at least to the extent of the $1,997 awarded to this child more than to the others, and that this was produced by the exhibition of the child before the jury.

Under the Act, this child was a beneficiary and entitled to participate in the recovery, and the exhibition of the child to the jury resulting from its presence in the court-room is not grounds for complaint unless an excessive verdict was thereby induced. We do not think the verdict excessive, either as to the gross award, nor as to the sum apportioned to the child. The pecuniary loss to it resulting from the negligent killing of the father was necessarily greater than to the other children.

3. It is also contended by appellant that the court erred in giving to the jury an instruction authorizing nine or more of the jury to return a verdict, and in refusing to give to the jury an instruction requested by appellant, requiring that the jury should all agree to a verdict; it being contended by appellant that in trials in the state courts of cases controlled by the Federal Employers' Liability Act, there must be a unanimous verdict by twelve men, as required
438 by the Seventh Amendment to the Constitution of the United States; and that Congress had not power to grant jurisdiction to try causes of action created by it, upon state courts not so consti-

tuted as to satisfy the guarantee of the Seventh Amendment as to jury trials. And it is further contended by appellant that Congress by the Act of April 5, 1910, amending the Federal Employers' Liability Act did not grant jurisdiction to state courts not so constituted as to satisfy the Seventh Amendment, to try causes of action under the Act mentioned.

Since the filing of the appellant's brief herein, this court has considered the above-mentioned contentions and decided them adversely to appellant's claims. Ches. & Ohio Ry. Co. v. Kelly's Admx., 161 Ky. 655; L. & N. R. R. Co. v. Johnson's Admr., 161 Ky. 824.

4. It is also contended by appellant that the trial court erred in refusing to give the instruction requested by it requiring the jury to believe that the plaintiff had established the issues by a preponderance of the evidence before they could find for her. This matter was likewise disposed of in the cases above mentioned.

5. Appellant also contends that the evidence failed to establish that the blow upon the head received by Stewart when Hill opened the angle-cock, resulted in his death. The evidence upon this
439 issue was conflicting but there was sufficient evidence to show that such was the proximate cause of his death. In fact we think it clearly does so and we will not disturb the finding of the jury in respect thereof.

The judgment is affirmed.

Sims & Rodes, Bowling Green; Benjamin D. Warfield, Louisville, Ky., for appellant.

Wright & McElroy, Bowling Green, Ky.; Hazelrigg & Hazelrigg, Frankfort, Ky.; B. F. Procter, Bowling Green, for appellee.

440 On the 30th day of April, 1915, the Appellant and Plaintiff in Error by its counsel filed in the office of the Clerk of the Court of Appeals its Petition for Writ of Error, which petition is in words and figures following, to-wit:

441 UNITED STATES OF AMERICA, *ss:*

Commonwealth of Kentucky to the Honorable Shackelford Miller, Chief Justice of the Court of Appeals of the Commonwealth of Kentucky:

Your petitioner, Louisville & Nashville Railroad Company, respectfully shows that on the 29th day of April, 1915, the Court of Appeals of Kentucky rendered a final judgment against your petitioner in a certain cause, brought under the Employers' Liability Act of Congress of April 22, 1908, to recover damages for the death of one of your petitioner's employes which occurred on September 27, 1908, and in which cause your petitioner was Appellant, and Jeanette Stewart, as Administratrix of the Estate of William H. Stewart, deceased, was Appellee, affirming the judgment of the Circuit Court of Warren county, Kentucky, wherein the said Jeanette Stewart, as Administratrix aforesaid, was plaintiff, and your petitioner was defendant, as will appear from the record of the proceedings in said

cause, and that said Court of Appeals of Kentucky is the highest court in said State in which a decision in said suit could be had; and your petitioner further shows that in said order and judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of said petitioner, all of which will more in detail appear from the Assignment of Errors, which is filed with this petition.

Wherefore, said petitioner prays that a Writ of Error from the Supreme Court of the United States may issue in this behalf to the Court of Appeals of Kentucky, for the correction of the errors so complained of, and that a Transcript of the Record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

442

JAMES C. SIMS.
JOHN B. RODES.
HENRY L. STONE.
BENJAMIN D. WARFIELD.

The Writ of Error, as prayed for in the foregoing petition, is hereby allowed, this 30th day of April, A. D. 1915, the Writ of Error to operate as a supersedeas, and the bond for that purpose is fixed at the sum of Seventeen thousand five hundred dollars, ($17,500.00).

Done at Frankfort, Kentucky, this 30th day of April, A. D. 1915.

SHACKELFORD MILLER,
Chief Justice of the Court of Appeals of Kentucky.

Filed in my office this 30th day of April, 1915, A. D.

____ ____,
Clerk Court of Appeals of Kentucky.

Filed Apr. 30 1915. Robt. L. Greene, C. C. A.

443 At the same time, to-wit, April 30, 1915, the Appellant and Plaintiff in Error filed its Writ of Error and allowance of same in said clerk's office, which is in words and figures following, to-wit:

444 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honourable the Judges of the Court of Appeals of the State of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals of Kentucky before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the Louisville & Nashville Railroad Company, Appellant, and Jeanette Stewart, as administratrix of the estate of William H. Stewart, deceased, Appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an

authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Louisville & Nashville Railroad Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, thirty days from the date hereof, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honourable Edward D. White, Chief Justice of the United States, and the seal of the District Court of the United States for the Eastern District of Kentucky, at Frankfort, Kentucky, on the 30th day of April, in the year of our Lord one thousand nine hundred and fifteen.

[Seal Eastern Kty. Dist. Court, United States of America.]

JNO. W. MENZIES,
Clerk of the District Court of the United States in and for the Eastern District of Kentucky,
By CHAS. N. WIARD, *D. C.*

Allowed by—
SHACKELFORD MILLER,
Chief Justice of the Court of Appeals of Ky.

[Endorsed:] Filed Apr. 30 1915. Robt. L. Greene, C. C. A.

445 At the same time, to-wit, April 30, 1915, the Appellant and Plaintiff in Error filed in said clerk's office its Assignment of Errors, which is in words and figures following, to-wit:

446 In the Supreme Court of the United States.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff in Error,
vs.
JEANETTE STEWART, Administratrix of the Estate of William H. Stewart, Deceased, Defendant in Error.

In Error to the Court of Appeals of Kentucky.

Assignment of Errors.

Now comes the Plaintiff in Error, Louisville & Nashville Railroad Company, by James C. Sims, John B. Rodes, Henry L. Stone and Benjamin D. Warfield, its attorneys, and says that in the record, proceedings, decision and final judgment of the Court of Appeals of the Commonwealth of Kentucky in the above entitled cause, which was brought and prosecuted under the Employers' Liability Act of Congress, of April 22, 1908, there is manifest error to the prejudice of this Plaintiff in Error in this, to wit:

First. The said Court of Appeals of Kentucky erred in entering judgment affirming the judgment of the Warren Circuit Court of Kentucky for the sum of Eleven Thousand Eight Hundred and Eighty Five Dollars, ($11,885.00), together with costs, interest, and 10% damages, entered in error in favor of said defendant in error and against said plaintiff in error.

Second. The said Court of Appeals of Kentucky erred in not reversing said judgment of the said Warren Circuit Court, and in not remanding said cause to said Warren Circuit Court for a new trial.

447 Third. The said Court of Appeals of Kentucky erred in approving the refusal of said Warren Circuit Court to direct the jury, on the motion made in that behalf by the plaintiff in error, to find a verdict in favor of the plaintiff in error, on the ground that the evidence was insufficient to justify the submission of the case to the jury for its consideration; and said Court of Appeals of Kentucky erred in not reversing the judgment of said Warren Circuit Court for its refusal to direct the jury to find a verdict in favor of the plaintiff in error.

Fourth. The said Court of Appeals of Kentucky erred in sustaining and approving the action of the Warren Circuit Court, as aforesaid, in giving to the jury, on said court's own motion, instruction No. 4, as follows:

"No. 4. The court instructs the jury that in the operation of defendant's train it was the duty of the plaintiff's intestate as engineer to exercise ordinary care for his own safety, and if he failed to exercise such care, and his own negligence contributed in any way to produce the injuries, if any, complained of in the petition, then to the amount of such negligence, if any, attributable to said Stewart, the jury shall diminish the damages, if any, which may be found by them, if any at all, under these instructions."

Said instruction No. 4, to the giving of which to the jury plaintiff in error objected and excepted at the time, being erroneous in that it directed the jury to diminish the damages "to the amount of" the employe's negligence, instead of, as required by section 3 of the Employers' Liability Act of Congress, of April 22, 1908, directing the jury to allow only a proportional amount bearing the same relation to the full amount as the negligence attributable to the employer bears to the entire negligence attributable to both the employer and the employe.

448 Fifth. The said Court of Appeald of Kentucky erred in sustaining and approving the action of the said Warren Circuit Court, and in holding that said court had committed no error, in giving to the jury, on the court's own motion, and over plaintiff's objection and exception, instruction No. 5, reading as follows:

"No. 5. The court instructs the jury that when the plaintiff's intestate entered the service of the defendant company as engineer, he assumed all the risks and hazards incident to that employment; and if the jury further believe from the evidence that flagman O. L. Hill stopped said train by the use of the air valve in the rear of the caboose, when it was necessary so to do, or when said flagman believed in the exercise of a reasonable judgment, in the prudent and careful operation of said train, it was necessary so to do, in order to avoid injury to property; and further believe that such stoppage of said train naturally and proximately resulted in the injury, if any, to said Stewart, complained of in the petition, then the law is for the defendant and the jury shall so find; Unless, however, they shall further believe from the evidence that the necessity, if any, for the application of said emergency air brake had been brought about by defendant's agents or servants, in the negligent operation of said train prior to the application of said brake, in which event they will find for plaintiff."

Said instruction No. 5 being erroneous because of the qualifying clause contained at the end of said instruction, reading as follows:

"Unless, however, they shall further believe from the evidence that the necessity, if any, for the application of said emergency air brake had been brought about by defendant's agents or servants, in the negligent operation of said train prior to the application of said brake, in which event they will find for plaintiff,"

as there was no evidence of negligence of any of plaintiff in error's agents or servants other than conductor Jones and flagman Hill, if they were negligent, which brought about the necessity for the application of the emergency air brake; and was also erroneous in directing the jury positively and without qualification to "find for plaintiff" (defendant in error) if the necessity for the application of the emergency air brake had been brought about by defendant's (plaintiff in error's) agents or servants in the negligent operation of the train; the qualification, which the trial court directed the jury would justify a verdict for the plaintiff, (defendant in error) being obscure and misleading.

449

Sixth. The Court of Appeals of Kentucky erred in sustaining and

approving the action of the trial court in giving to the jury, on the court's own motion, and over the objection and exception of the plaintiff in error, instruction No. 7, reading as follows:

"No. 7. Nine of the jury may find a verdict, but if less than the entire jury agree, then those who do agree must sign the verdict."

And said Court of Appeals of Kentucky also erred in sustaining and approving the action of the trial court in refusing to give to the jury instruction C offered by defendant, plaintiff in error here, and which instruction reads as follows:

"C. The court instructs the jury that if they should find against defendant all of the jury must agree to said verdict."

And to which said action of said trial court in refusing to give said instruction C plaintiff in error excepted at the time.

Said instruction No. 7 was erroneous, and the refusal to give said instruction C was erroneous, in that thereby the jury was authorized to find a verdict by only nine, or ten, or eleven of the twelve jurors in violation of the Seventh Amendment of the Constitution of the United States, a limitation upon Congress in enacting the Act of Congress known as the Federal Employers' Liability Act of April 22, 1908, upon which said Act this cause of action is founded, and a limitation upon every court and tribunal which entertains for trial causes of action, such as this one, arising under the said Act of Congress, this being a suit at common law where the value in controversy exceeds twenty dollars, and in which, by the said Seventh Amendment, right of trial by jury shall be preserved.

450 Said Court of Appeals of Kentucky further erred in its construction of said Seventh Amendment of the Constitution of the United States, as applied to this cause, as shown by the opinion of Hannah J., filed in said Court of Appeals of Kentucky for the said court, March 26, 1915. (163 Ky. 823), as follows:

"3. It is also contended by appellant that the court erred in giving to the jury an instruction authorizing nine or more of the jury to return a verdict, and in refusing to give to the jury an instruction requested by appellant, requiring that the jury should all agree to a verdict; it being contended by appellant that in trials in the state courts of cases controlled by the Federal Employers' Liability Act, there must be a unanimous verdict of twelve men, as required by the Seventh Amendment to the Constitution of the United States; and that Congress had not power to grant jurisdiction to try causes of action created by it, upon state courts not so constituted as to satisfy the guarantee of the Seventh Amendment as to jury trials. And it is further contended by appellant that Congress, by the Act of April 5, 1910, amending the Federal Employers' Liability Act did not grant jurisdiction to state courts not so constituted as to satisfy the Seventh Amendment, to try causes of action under the Act mentioned.

"Since the filing of the appellant's brief herein, this court has considered the above-mentioned contentions and decided them adversely to appellant's claim. Ches. & Ohio Ry. Co. v. Kelly's Admrx. 161 Ky. 655; L. & N. R. R. Co. v. Johnson's Admr. 161 Ky. 824".

For the foregoing prejudicial errors and each of them affecting the

merits of this cause the plaintiff in error prays a reversal of the judgment of said Warren Circuit Court of Kentucky and of the judgment of affirmance thereof by the said Court of Appeals of Kentucky.

And the said Louisville & Nashville Railroad Company, as plaintiff in error, prays that the judgment aforesaid, for each of the errors aforesaid, whereby the plaintiff in error has been deprived of its rights, privileges and immunities, be reversed, annulled and held for naught.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
By JAMES C. SIMS,
JOHN B. RODES,
HENRY L. STONE,
BENJAMIN D. WARFIELD,
Its Attorneys.

451 I, B. F. Procter, counsel for defendant in error, Jeanette Stewart, Admx. of the estate of Wm. H. Stewart, deceased, hereby accept service of the foregoing assignment of errors, by receiving copy of same.

Given under my hand this April 24th, 1915.

B. F. PROCTER,
Counsel for Defendant in Error, Jeanette Stewart, Adm'r'x of the Estate of Wm. H. Stewart, Deceased.

Filed Apr. 30, 1915. Robt. L. Greene, C. C. A.

452 At the same time, to-wit, on April 30, 1915, the Appellant and Plaintiff in Error filed its Writ of Error Bond, which is in words and figures following, to-wit:

453 Court of Appeals of the State of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
v.
JEANETTE STEWART, Administratrix of the Estate of William H. Stewart, Deceased, Appellee.

Supersedeas Bond.

Know all men by these presents: That the Louisville & Nashville Railroad Company, as principal, and the National Surety Company, of New York, as surety, are held and firmly bound unto Jeanette Stewart, as Administratrix of the Estate of William H. Stewart, deceased, in the sum of seventeen thousand five hundred dollars ($17,500.00) to be paid to the said obligee, and to her successors in office, representatives and assigns, to the payment of which well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, by these presents,

In testimony whereof we have hereunto subscribed our names and affixed our seals this 30th day of April, A. D. 1915.

Whereas the above named, Louisville & Nashville Railroad Company, hath prosecuted, as plaintiff in error, a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Court of Appeals of the State of Kentucky.

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute its said writ of error to effect, and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

454 [SEAL.] LOUISVILLE & NASHVILLE RAILROAD COMPANY,
By W. L. MAPOTHER.
NATIONAL SURETY COMPANY OF NEW YORK,
By J. MORTON MORRIS,
Its Attorney in Fact.

STATE OF KENTUCKY,
County of Jefferson, sct:

I, F. P. Caldwell, a Notary Public within and for the above named county and State, certify that on this day and in said county and State the foregoing instrument was produced to me, and was acknowledged by W. L. Mapother, First Vice President of the above named Louisville & Nashville Railroad Company, to be its act and deed, and was also acknowledged by J. Morton Morris, attorney in fact of the above named National Surety Company of New York, for and on behalf of said Surety Company to be its act and deed.

Given under my hand and official seal this 30th day of April, A. D. 1915. My commission expires March 14th, 1918.

[SEAL.] J. P. CALDWELL,
Notary Public, Jefferson County, Kentucky.

I hereby approve the foregoing bond and surety, this 30th day of April, A. D. 1915.

SHACKELFORD MILLER,
Chief Justice of the Court of Appeals of Kentucky.

Filed Apr. 30, 1915. Robt. L. Greene, C. C. A.

455 Afterwards, to-wit, on May 4, 1915, the Appellant and Plaintiff in Error filed its Citation with return of service on same:

456 UNITED STATES OF AMERICA, *ss:*

In the Court of Appeals of the Commonwealth of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff in Error,
v.
JEANETTE STEWART, as Administratrix of the Estate of William H. Stewart, Deceased, Defendant in Error.

You, Jeanette Stewart, as administratrix aforesaid, are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error issued out of this court and filed in the office of the Clerk of the Court of Appeals of Kentucky, wherein said Louisville & Nashville Railroad Company, is plaintiff in error and the said Jeanette Stewart, as administratrix of the estate of William H. Stewart, deceased, is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honourable Shackelford Miller, Chief Justice of the Court of Appeals of the Commonwealth of Kentucky, this 30th day of April, in the year of our Lord one thousand nine hundred and fifteen.

SHACKELFORD MILLER,
Chief Justice of the Court of Appeals of Kentucky.

Attest:
ROBT. L. GREENE,
Clerk Court of Appeals of Kentucky.

Copy of the above citation received and service accepted this 3rd day of May, A. D. 1915.

B. F. PROCTER,
Of Counsel for Defendant in Error.

Filed May 4, 1915. Robt. L. Greene, C. C. A.

[Endorsed:] Filed May 4, 1915. Robt. L. Greene, C. C. A.

457 And on the 30th day of April, 1915, the Appellant and Plaintiff in Error filed its Præcipe, which is in words and figures following, to-wit:

458 Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
v.
JEANETTE STEWART, Administratrix of the Estate of William H. Stewart, Deceased, Appellee.

Præcipe of said Appellant, Now Plaintiff in Error.

In conformity with Rule 8 of the Supreme Court of the United States, and in order to the preparation of the Transcript of Record upon the Writ of Error from said Supreme Court to the Court of Appeals of Kentucky, the above named, Louisville & Nashville Railroad Company, Appellant in said Court of Appeals, indicates the following as the portions of the Record in this action to be incorporated into the Transcript of Record on said Writ of Error, to-wit:

To be copied from the Record on the first appeal known on the second appeal as the "Old Record," on the pages as shown below:

1. The preamble on page 1.
2. The plaintiff's original petition, on pages 1 to 4, inclusive.
3. The plaintiff's first amended petition, and the order filing same, on page 5.
4. The order showing defendant's motion to require plaintiff to elect whether she would proceed under the Tennessee law or under the Federal statute, on page 6.
5. The order noting the filing of defendant's motion to strike out certain portions of the petition, on page 6.
6. And said motion to strike, on page 7.
7. The order sustaining defendant's motion to strike, pages 7 & 8.

459 8. Defendant's demurrer to the petition, pages 8 to 10.
9. Order overruling said demurrer, page 10.
10. Order sustaining defendant's motion to make the petition more specific, on page 11, and said motion on the same page.
11. Order of November 11, 1911, sustaining said motion.
12. Plaintiff's amended petition, page 13, and the order filing same, page 12.
13. Plaintiff's third amended petition, on page 14, and the order filing same, on pages 14 and 15.
14. Order April 5, 1912, sustaining defendant's motion to make the petition more specific, page 15.
15. Defendant's motion to strike from the petition, on page 16.
16. Order overruling said motion, page 17.
17. Order overruling defendant's motion to strike from plaintiff's amended petition No. 3; and filing and overruling defendant's general demurrer to plaintiff's petition as amended; and filing defendant's answer, over plaintiff's objection pages 17 and 18.
18. (Defendant's general demurrer to plaintiff's petition as amended, page 18.
19. Defendant's motion to strike from plaintiff's amended petition No. 3, page 19.

20. Defendant's answer, pages 19 to 21.

21. Plaintiff's reply, pages 23 and 24.

22. Defendant's amended answer, tendered to conform to the proof, pages 42 to 44, and the order of April 10, 1912, overruling defendant's motion to file same, and showing defendant's exception to said action of the court, page 25.

460 22½. The opinion reversing judgment on first appeal 156 Ky. 550, and the response to petitions for modification, etc. 157 Ky. 642; to be copied from the Record on the second appeal, known as the "New Record," on pages hereinafter set out.

23. The preamble on page 1.

24. Order reinstating case upon docket of Warren circuit court, and filing the mandate of the Court of Appeals of Kentucky reversing the judgment on the first appeal, pages 1 and 2.

25. Order tendering and filing defendant's amended answer, pages 2 and 3.

26. Defendant's amended answer, page 3.

27. Plaintiff's reply thereto, page 4.

28. Order filing defendant's exceptions to plaintiff's depositions, and order of trial, page 5.

29. Order May 27, 1914, page 6.

30. Verdict and judgment, pages 6 and 7.

31. Defendant's motion for new trial and order filing same, pages 9 to 12, inclusive.

32. Order overruling defendant's motion for new trial, pages 12, 13.

33. Order tendering defendant's Bill of Exceptions, pages 13, 14.

34. Order approving defendant's Bill of Exceptions and the Stenographer's Transcript of Evidence, page 14.

35. Defendant's Bill of Exceptions, pages 15 to 22, inclusive.

36. Supersedeas bond given by defendant on its appeal from the judgment of the Warren circuit court to the Kentucky Court of Appeals, and of the power of attorney of the surety authorizing the execution of said bond, pages 25 to 27, inclusive.

461 37. Order of Clerk of Warren Circuit Court, issuing supersedeas, page 28.

38. The Stenographer's Transcript of Evidence on the second appeal, which was approved by McKenzie Moss, Judge of the Warren circuit court the 2nd day of November, 1914, and which was filed in this court December 8, 1914, and the exhibits referred to in and made a part of the record by said Transcript of Evidence, and which were filed as a part of the record upon the appeal from the judgment of the Warren circuit court of May 28, 1914, to the Court of Appeals of Kentucky.

39. The Judgment of affirmance and the opinion of the Court of Appeals of Kentucky, March 26, 1915 (163 Ky. 823).

40. The mandate of the Court of Appeals, dated April 30, 1915, entering final judgment in conformity with the opinion of March 26, 1915 (163 Ky. 823).

41. The Petition for Writ of Error; the Writ of Error and allow-

ance of same; the Assignment of Errors, the Writ of Error Bond; the Citation, and return of service of same; and this Præcipe, and the return of service of same.

JAMES C. SIMS,
JOHN B. RODES,
HENRY L. STONE,
BENJAMIN D. WARFIELD,
Counsel for the Above-named Appellant and Plaintiff in Error.

Executed at 9:30 o'clock A. M. April 23, 1915, by delivering to B. F. Proctor, attorney of record of and for the appellee, Jeanette Stewart, admrx. of the estate of Wm. H. Stewart, deceased, a true and correct copy of the above præcipe.

Witness my hand this April 23, 1915.

JOHN C. RAY,
Sheriff of Warren County, Ky.

Filed Apr. 30, 1915. Robt. L. Greene, C. C. A.

462 On the 4th day of May, 1915, the Appellee and Defendant in Error by her counsel filed in the office of the Clerk of the Court of Appeals her Præcipe, which is in words and figures following, to-wit:

463 Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
JEANETTE STEWART, Administratrix of the Estate of W. H. Stewart, Deceased, Appellee.

Præcipe of Appellee, now Defendant in Error.

This Appellee, now Defendant in error, Jeanette Stewart, Administratrix of W. H. Stewart, deceased, comes by her Attorneys B. F. Procter and Wright & McElroy and asks and directs as provided by Rule 8 of the Supreme Court of the United States, that in addition to the parts of the record filed in the cause named in the caption, in the Court of Appeals of Kentucky, ordered copied in the præcipe of appellant, that the following portions of what is termed the "old record," that is the record used on the first appeal, be incorporated into the transcript on the Writ of Error, to-wit:

1. Order empaneling Jury and ordering testimony reported by official stenographer pages 24 and 25.
2. Verdict and judgment thereon, page 26.
3. Motion and Grounds for a New Trial, Pages 27, 28, 29, 30.
4. Order overruling motion for New Trial, granting appeal and extending time to file bill of exceptions, Pages 33, 34.
5. Order tendering bill of exceptions and Transcript, Page 34.
6. Order filing said transcript and Bill of Exceptions, Page 35.

7. The bill of exceptions, Pages 35 to 45.

464 8. Transcript of the evidence reported by the official stenographer on the first trial and filed on the first appeal in this cause, filed November 8, 1912, with preamble and certificate of stenographer and Circuit Judge, including index.

9. Order appointing Appellee, Jeanette Stewart, Administratrix of W. H. Stewart, deceased, Pages 69, 70.

10. Supersedeas bond and Power of Attorney, Old Record, Pages 100 to 104.

11. Supersedeas, page 104.

12. Certificate of O. A. Roup, page 105.

13. Rule VII of the Court of Appeals of Kentucky, requiring that record of former appeal be placed with the new appeal, if not copied into the transcript.

14. Pages 1, 2, 3, of the Supplemental Brief filed May 27, 1913, for Appellee in the old record.

15. Page 2 of the reply to said supplemental Brief for Appellee except the two last lines, the quotation ending with the "cause of Appellee." Said brief was filed May 7, 1913.

16. The opinion of the Court of Appeals of Kentucky, reversing the judgment on the first trial in said cause and ordering a new trial, reported in Kentucky Reports, 156 Ky. 550.

17. The modified opinion of said court in said cause, 157 Ky. 642.

18. The 1, 2, 3, Pages of Appellee's petition for rehearing filed on the first appeal in said cause, February 3, 1914, and the first five lines on the fourth page, then omitting the remainder of the 4th page, and the 5th page which discusses the depositions offered and rejected, and include the conclusion on Page 6 and the summary and authorities except the third subdivision which discusses the rejected depositions.

465 19. Plaintiff's Motion and grounds for New Trial, New Record on Second Appeal, page 8.

20. Plaintiff's bill of exceptions and order filing same, new record, second appeal, Pages 23, 24, 25.

21. This præcipe and return of service or acceptance, Petition for writ of error and Cross Appeal, Writ of Error with citation and return, bond on writ of error, assignment of errors on Cross-Appeal.

B. F. PROCTER,
WRIGHT & McELROY,
Counsel for Appellee and Defendant in Error.

The undersigned as counsel for plaintiff in error in the cause of the L. & N. R. R. Company vs. Jeanette Stewart's Adm'r'x of the estate of W. H. Stewart, deceased, accept service of the foregoing præcipe and acknowledge delivery of a copy of same.

This May 1, 1915.

SIMS & RODES.

466 And afterwards on the 5th day of May, 1915, the Appellee and Defendant in Error by her counsel filed in the Clerk's

office of said Court of Appeals the following Supplemental Præcipe, which is in words and figures, following, to-wit:

467 In the Court of Appeals of Kentucky.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
JEANETTE STEWART, Administratrix of W. H. Stewart, Deceased, Appellee.

Supplemental Præcipe for Appellee.

Pursuant to Rule 8 of the Supreme Court of the United States and because of an objection by counsel for Appellant,

1. That the matters and things indicated in subdivisions 13, 14, 15 and 18 of the Præcipe of Appellee heretofore filed are not a part of either the first or second appeal in this cause, and objecting to copying same, this is therefore to ask a copy of the indorsement on the record by the Clerk in the office of the said Court of Appeals as follows:

"1914, Dec. 8, Old Record of same style placed with this appeal," and if there is a further order to the same effect copy same as part of the record.

2. Counsel for Appellant also object that subdivision 16 of the præcipe for Appellee asks to have the opinion reversing the judgment in the lower court, and also the opinion modifying that opinion copied when both are embraced in the præcipe of Appellant, this being true, omit said copying, but refer to them as embraced in the transcript ordered by Appellee citing page where they are found in copy made for Appellant. Do likewise with any other part of the record embraced in the præcipe of Appellant, and also in that of Appellee. To this extent and no further is the præcipe of Appellee changed.

B. F. PROCTER AND
WRIGHT & MCELROY,
468 *Counsel for Appellee.*

Filed May 3, 1915. Robt. L. Greene, C. C. A.

Received a copy of the foregoing Præcipe and service acknowledged this May 4th, 1915.

SIMS & RODES,
Of Counsel for Appellant.

469 Kentucky Court of Appeals, Spring Term, 25th Day of May, 1915.

L. & N. R. R. Co.
vs.
STEWART'S ADMR-.

Warren.

Came the appellant by counsel and moved the court to be permitted to withdraw the original exhibits herein, to-wit "Three photographs, two railroad time-tables and enginemen's report of running and delay time" for use on an appeal of this case to the Supreme Court of the United States, which motion being heard is sustained and leave is given to withdraw said exhibits for the purposes of said appeal.

470 THE COMMONWEALTH OF KENTUCKY,
The Court of Appeals, sct:

In obedience to the commands of the attached Writ of Error, I hereby transmit to the Supreme Court of the United States, a complete transcript of the record as directed to be copied by the Præcipe of the Plaintiff in Error and the Præcipe and supplemental Præcipe of the Defendant in Error filed in the case of Louisville and Nashville Railroad Company, Plaintiff in Error, and appellant, against William H. Stewart's administrator-, Defendant in Error and appellee, as the same appears of record and on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of my office. Done at Frankfort, Kentucky, on this the 25th, day of May, A. D. 1915.

[Seal Kentucky Court of Appeals.]

ROBERT L. GREENE,
Clerk of the Court of Appeals of Kentucky.

Fee for this transcript, $118.50.

Endorsed on cover: File No. 24,757. Kentucky Court of Appeals. Term No. 485. Louisville & Nashville Railroad Company, plaintiff in error, vs. Jeanette Stewart, as administratrix of the estate of William H. Stewart, deceased. Filed June 1st, 1915. File No. 24,757.

2

TRANSCRIPT OF RECORD ON CROSS-WRIT OF ERROR.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 904.

JEANETTE STEWART, AS ADMINISTRATRIX OF THE ESTATE OF WILLIAM H. STEWART, DECEASED, PLAINTIFF IN ERROR,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED MARCH 16, 1916.

(26,187)

(25,187)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 904.

JEANETTE STEWART, AS ADMINISTRATRIX OF THE ESTATE OF WILLIAM H. STEWART, DECEASED, PLAINTIFF IN ERROR,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 22, 1916.

1 THE COMMONWEALTH OF KENTUCKY:

The Court of Appeals.

Pleas Before the Honorable the Court of Appeals of Kentucky at the Capitol, at Frankfort, Ky., on the 11th Day of March, 1911.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant (Now Defendant in Error),
vs.
JEANETTE STEWART, Administratrix of the Estate of Wm. H. Stewart, Deceased, Appellee (Now Plaintiff in Error).

Appeal from Warren Circuit Court.

Be it Remembered, that heretofore, to-wit, on the 11th day of March, 1916, the Appellee now plaintiff is error by her attorney, filed in the office of the Clerk of the Court of Appeals of Kentucky the following præcipe, and which is in words and figures as follows:

Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
v.
JEANETTE STEWART, Administratrix of the Estate of William H. Stewart, Deceased, Appellee.

2 *Præcipe of Said Appellee, Now Plaintiff in Error.*

To the Honorable Clerk of said Court:

Please make a transcript of the record in the above entitled matter, containing the following documents, records and proceedings, and no others:

(1) Assignment of errors of Jeanette Stewart, Administratrix of the estate of William H. Stewart, deceased.

(2) Petition of said Jeanette Stewart, Administratrix of the estate of William H. Stewart, deceased for cross writ of error from the Supreme Court of the United States to the Court of Appeals of Kentucky, with evidence of the allowance thereof;

(3) The writ of error as allowed;

(4) Bond of said Jeanette Stewart, administratrix, of the estate of William H. Stewart, deceased, as approved.

(5) Citation and return of service of same.

(6) This præcipe and evidence of service on same.

Very respectfully,

B. F. PROCTOR,
WRIGHT & McELROY AND
GEORGE H. LAMAR,
Counsel for Jeanette Stewart, Adm'x of the Estate of Wm. H. Stewart, Dec'd, Plaintiff in Error.

We, James C. Sims and John B. Rodes, partners as Sims & Rodes, counsel for Louisville & Nashville Railroad Company defendant in error hereby acknowledge service of the foregoing præcipe
3 and of the delivery of a copy of same to us. This 8th day of March, 1916.

JAMES C. SIMS,
JNO. B. RODES,
Partners as Sims & Rodes.

Endorsed: Filed March 11, 1916. R. W. Keenon, C. C. A.

And then on the same day of said term, to-wit the following Assignment of Errors were filed herein.

In the Supreme Court of the United States.

JEANETTE STEWART, Administratrix of the Estate of William H. Stewart, Deceased, Plaintiff in Error,
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Defendant in Error.

In Error to the Court of Appeals of Kentucky.

Assignment of Errors.

Now comes this plaintiff in Error, Jeanette Stewart, administratrix of William H. Stewart, deceased, by Benjamin F. Proctor, Wright and McEllory and George H. Lamar, her attorneys, and says that in the record, proceedings, decisions and judgments, including the final judgment of the Court of Appeals of the Commonwealth of Kentucky, in this cause, which was brought and prosecuted under the Employers' Liability Act of Congress of April 22, 1908,
4 there is manifest error to the prejudice of this plaintiff in error and those she represents in this, to-wit;

First. That said Court of Appeals of Kentucky erred in its judgment of March 26, 1915, in so far as the same rendered final to its prior judgment of February 27, 1914, reversing the judgment of the trial court of April 11, 1912, in favor of this plaintiff in error for $20,000.00 and costs and remanded the cause for a new trial and for further proceedings consistent with the opinion of December 19, 1913, and the modified opinion of February 27, 1914, of said Court of Appeals of Kentucky.

Second. That said Court of Appeals of Kentucky erred in its final judgment of March 26, 1915, in not setting aside its said prior judgment of February 27, 1914, and in not reinstating said judgment of the trial court of April 11, 1912, for $20,000.00 and costs.

Third. That the Court of Appeals of Kentucky, in reversing said judgment for this plaintiff in error for $20,000.00 based upon the verdict of a jury rendered without the defendant in said action asking the trial to instruct the jury to apportion the damages, erred in

proceeding upon the hypothesis that such apportionment was essential to a valid judgment under said Act of Congress and that it was the duty of the trial Court to instruct the jury to apportion the recovery between the beneficiaries; whereas said Act of Congress has been construed directly to the contrary of the Supreme Court of the United States in a similar case, Central Vermont Railway
5 Company vs. White's administratrix, decided June 21, 1915.

Fourth. That said Court of Appeals of Kentucky, in reversing said judgment for $20,000.00 and costs, erred in holding that instructions numbered 1 and 3, as voluntarily given by the trial Court, were erroneous because the same "might authorize the jury to consider mental anguish, and loss of companionship and so on," to-wit:

"Instruction No. 1. The court instructs the jury that if they believe from the evidence that on the occasion in controversy that the defendant's agents and employees in charge of its train, or any of them, did with negligence, operate and manage the train upon which plaintiff's intestate, W. H. Stewart, was serving as engineer, so as to cause him to fall against the cab of the engine and injure him, and that he died as the natural and proximate result of said negligence if any, they shall find for plaintiff such a sum as will fairly compensate his estate for his death if it occurred wholly or in part from the negligence, if any, of the servants or agents of defendant as aforesaid, not to exceed the amount sued for, to-wit: $35,000.

* * * * * * *

"Instruction No. 3. The court further instructs the jury that in estimating the damages aforesaid, if any, they may take into consideration the capacity of said Stewart to earn money the probable duration of life, his habits or industry, and sobriety and his skill in business in which he was engaged, but his habits of industry and sobriety are not to be considered by them except for the purpose of showing his power to earn money."

And said court further erred in its said opinion of December 19, 1915, in commenting upon said instructions as follows:

"The correct measure of damages in such cases has been so often pointed out by this court that it would seem unnecessary to cite authority; but in this case in the first instruction the plaintiff is permitted to recover such a sum as will fairly compensate his estate for his death. Instructions similar to that have been frequently condemned upon the idea that it might authorize the jury to consider mental anguish, loss of companionship and so on. The true measure of damages is that sum that will compensate his estate for the destruction of his power to earn money. * * * Instruction No. 3 is erroneous for the same reason as instructions No. 1; it should have been in substance that the measure of recovery is such
6 sum as will compensate his estate for the destruction of his power to earn money, and that the jury may, in arriving at this amount consider all the evidence in the case bearing upon this question."

Whereas the defendant in said trial court utterly failed to exercise its opportunity to point out any alleged error in said instruction or

to submit proposed instructions upon that phase of the case; the said voluntary instructions of the trial Court numbered 1 and 3 were not prejudicial to the defendant but, as given were more favorable to the defendant than to the plaintiff; taken together, they affirmatively convey the idea of financial support for the defendants, as contradistinguishes from other forms of damages; and said instructions do not even suggest, what the Court of Appeals in its said opinion practically excludes the right to have the jury find in damages the loss to each child "of that care, counsel, training and education which it might, under the evidence, have reasonably received from the parent, and which can only be supplied by the services of another for compensation;" and

Whereas said Court of Appeals of Kentucky itself, in its subsequent opinion of February 27, 1914, in "Response to Petition for Modification and Rehearing," said:

"Overlooking for the instant that this case was tried under the Federal Employers' Liability Act, and by reason of the haste and confusion incident to the closing day of a term of this Court, the Kentucky rule as to the measure of damages was incorrectly directed to be given on another trial instead of the measure of damages prescribed by the Federal Statute.

Upon a new trial the measure of damages will be given under the Federal Statute as construed by the Supreme Court of the United States, all of which is carefully gone into and pointed out in the case of C. & O. R'y vs. Dwyer's Adm'x 157 Ky. 590.

To the extent indicated the opinion is modified."

Fifth. That the said Court of Appeals of Kentucky in reversing said judgment for $20,000.00 and costs, erred in holding that
7 Instruction No. 4, as voluntar-y given by the trial court, was erroneous: to-wit:

"Instructions No. 4. The Court instructs the jury that in the operation of defendant's train it was the duty of the plaintiff's intestate as engineer to exercise ordinary care for his own safety and if he failed to exercise such care and his own negligence contributed in any way to produce the injuries, if any complained of in the petition, then to the amount of such negligence, if any attributable to said Stewart, the jury shall diminish the damages, if any, which may be found by them if any at all, under these instructions."

Whereas the defendant in said trial Court utterly failed to exercise its opportunity to point out any alleged error in said instruction or to submit to said trial Court any proposed instruction upon that phase of the case; and, although said instruction was conformable to the Federal Statute and could not be prejudicial to the defendant in said action, yet, by reason of the lack of evidence of negligence on the part of decedent, the voluntary submission by the Court of an instruction suggesting possible negligence on his part necessarily tended, is anything toward the prejudice of the plaintiff in said action, this plaintiff in error, and not to the prejudice of the defendant in said action.

Sixth. That said Court of Appeals of Kentucky especially erred in finding in its opinion that Hill the flagman was not negligent

under the proof in applying the emergency brake and that he did the only thing which he could reasonably have done, and holding that in another trial of the case the second instruction which deals alone with the negligence of Hill should be eliminated if the evidence is the same, for the reason, that the evidence showed that Hill was guilty of gross negligence in that he should have been
8 near the switch staff instead of several hundred feet away, and that he had no duty elsewhere, and that there was no necessity to apply the emergency brake, and that instruction No. 2 was properly given. Said instruction is as follows:

"Instruction No. 2. The court instructs the jury that under the rules of defendant's Company, it was the duty of the flagman O. L. Hill to apply the emergency air brake by the use of the angle-cock on the rear of the train, only when necessary to avoid injury to life or property; and if they believe from the evidence that at the time said Hill applied said emergency air brake, it was not necessary, nor believed by the flagman to be necessary in the exercise of a reasonable judgment in the prudent and careful operation of the train, to apply said emergency air brake to avoid injury to life or property, and shall further believe from the evidence that plaintiff's intestate received the injury which resulted in his death, as the direct and proximate result of the application of said emergency air brake, then they should find for plaintiff."

Seventh. That said Court of Appeals of Kentucky, in reversing said judgment for $20,000 and costs, erred in holding that there was any reversible error in the trial Court at the first trial in which said judgment for $20,000 and costs was rendered.

For the foregoing prejudicial errors, and each of them affecting the merits of this cause this plaintiff in error prays a reversal of the judgments setting aside and supplanting said original judgment of April 11, 1912, for $20,000 and costs; that the same may be reversed, annulled and held for naught, and that such action may be taken by this Honorable Court as may be requisite and necessary to cause said judgment for $20,000 and costs to be reinstated and rendered final in favor of this plaintiff in error.

JEANETTE STEWART,
Administratrix of the Estate of
William H. Stewart, Deceased,
By B. F. PROCTOR,
WRIGHT & McELROY AND
GEORGE H. LAMAR,
Her Attorneys.

9 We, Sims & Rodes, James C. Sims and John B. Rodes counsel for defendant in error Louisville & Nashville Railroad Company hereby accept service of the foregoing assignment of errors by receiving a copy of same at 4.30 o'clock P. M. this day.

Given under our hands this the 10 day of March, 1916.

SIMS & RODES,
JAMES C. SIMS,
JNO. B. RODES,
Attorneys for Defendant in Error, L. & N. R. R. Co.

Endorsed: March 11th, 1916, filed. Rodman W. Keenon, Clerk, C. A.

And then on the same day the following cross writ of error was filed herein.

UNITED STATES OF AMERICA, *ss:*

Commonwealth of Kentucky to the Honorable Shackelford Miller, Chief Justice of the Court of Appeals of the Commonwealth of Kentucky:

Your petitioner, Jeanette Stewart, administratrix of the estate of William H. Stewart, deceased, respectfully shows that she is aggrieved by the final judgment of the Court of Appeals of Kentucky of March 26, 1915, rendering final the prior judgment of said Court of Appeals February 27, 1914, adverse to petitioner and which reversed the judgment of April 11, 1912, of the Warren Circuit
10 Court in favor of petitioner for twenty thousand ($20,000) dollars and costs and remanded for new trial and further proceedings consistent with the opinion and modified opinion of said Court of Appeals, rendered respectively December 19, 1913, and February 27, 1914, all in a certain action brought by petitioner in the Warren Circuit Court against the Louisville and Nashville Railroad Company as defendant under authority of the Act of Congress entitled, "An Act relating to the liability of common carriers by railroad to their employes in certain cases," approved April 22, 1908, and based upon rights acquired under said Act of Congress for losses sustained by the dependent widow and three minor children of the said William H. Stewart, who died September 27, 1908, as the result of an injury sustained by him on September 5, 1908, while an employee of the said Louisville and Nashville Railroad Company and engaged in interstate traffic and commerce and which injury and death were caused through the negligence of said common carrier; and in which cause, after said judgment for twenty thousand ($20,000) dollars and costs had been duly rendered in favor of the plaintiff, your petitioner, upon a unanimous verdict duly rendered by a jury of twelve men, the said defendant, Louisville and Nashville Railroad Company, appealed therefrom to the Court of Appeals of Kentucky, with the result, aforesaid, that said Court of Appeals did so construe said federal statute adversely to this petitioner as that, by its order and judgment of February 27, 1914, said judgment in favor of petitioner for twenty thousand ($20,000) dollars and costs was reversed and the cause remanded as aforesaid and, ultimately, said judgment was made or became final and re-
11 viewable by said subsequent judgment of the Court of Appeals of Kentucky of March 26, 1915; and by which said final judgment the Court of Appeals of Kentucky did deny the second appeal of said Louisville and Nashville Railroad Company by affirming with costs and ten per cent damages the judgment of the Warren Circuit Court of May 28, 1914, for eleven thousand eight hundred and eighty-five ($11,885) dollars entered in favor of petitioner upon the unanimous verdict of a jury of twelve men at the

second trial had pursuant to the aforesaid action of the Court of Appeals of Kentucky, the jury in said verdict apportioning the aggregate amount thereof between the widow and three infant children of said decedent; and by which said final judgment of the Court of Appeals, rendering final its said judgment of reversal of February 27, 1914, the Court of Appeals in effect substituted said second judgment for eleven thousand eight hundred and eighty five ($11,885) dollars with damages, interest and costs for the said first judgment in favor of petitioner for twenty thousand ($20,000) dollars and such damages, interest and costs which should have accrued thereon,—as all of which will appear from the record of the proceedings in said cause.

And your petitioner further shows that the Court of Appeals of Kentucky is the highest Court in said State in which a decision in said cause could be had; and that in said order and judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of your petitioner involving federal questions subject to review by the Supreme Court of the United States, as all of which will more in detail appear from the assign-

12 ment of errors, which is filed with this petition.

And your petition- further shows that said Louisville and Nashville Railroad Company has heretofore prayed a writ of error from the Supreme Court of the United States to said Court of Appeals of Kentucky, and the same was allowed by the Chief Justice of said Court of Appeals of Kentucky on the 30th day of April, 1915.

Wherefore your petitioner prays that a cross writ of error from the Supreme Court of the United States may issue in this behalf to the Court of Appeals of Kentucky, for the correction of the errors so complained of by your petitioner and that a transcript of the record appropriate for said cross writ of error, duly authenticated, may be sent to the Supreme Court of the United States.

B. F. PROCTOR,
WRIGHT & McELROY, AND
GEORGE H. LAMAR,
Counsel for Jeanette Stewart, Administratrix of Wm. H. Stewart, De'd.

The cross-writ of error as prayed for in the foregoing petition, is hereby allowed this 11 day of March, 1916, and the penalty of the bond for costs if fixed at the sum of One Thousand Dollars.

Done at Frankfort, Kentucky, this 11 day of March, 1916.

SHACKELFORD MILLER,
Chief Justice of the Court of Appeals of Kentucky.

To the allowance of the aforesaid cross writ of error the

13 Louisville & Nashville Railroad objects and excepts, this March 11, 1916.

SHACKELFORD MILLER,
Chief Justice of the Court of Appeals of Kentucky.

Endorsed: 1916, March 11th, filed. Rodman W. Keenon, C. C. A.

And then on the same day of said term, to-wit the following writ of error was filed herein.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Court of Appeals of the State of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals of Kentucky before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the Louisville and Nashville Railroad Company appellant and Jeanette Stewart as Administrator of the estate of William H. Stewart deceased, appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their
14 validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein any title, right, privilege or immunity was claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege, or immunity espeially set up or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said Jeanette Stewart administratrix of the estate of William H. Stewart, deceased, as by her complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein, given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, and the seal of the District Court of the United States for the Eastern District of Kentucky, at Frankfort, Ken-
15 tucky on the 11th day of March in the Year of our Lord one thousand nine hundred and sixteen.

[SEAL.] J. W. MENZIES,
Clerk of the District Court of the United States in and for the Eastern District of Kentucky,
By M. S. BARRETT,
Deputy Clerk.

Allowed by
SHACKELFORD MILLER,
Chief Justice of the Court of Appeals of Kentucky.

Endorsed: 1916, March 11th, filed. Rodman W. Keenon, C. C. A.

And then on the said day, the following Bond was filed herein to-wit:

Know all men by these presents, that we, Jeanette Stewart Administratrix of the estate of William H. Stewart, deceased, as principal, and National Surety Company, as sureties, are held and firmly bound unto the Louisville and Nashville Railroad Company a corporation, in the full and just sum of One Thousand ($1000.00) dollars, to be paid to the said Louisville and Nashville Railroad Company, a corporation, its successors, attorneys or assignees, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 11th day of March, 1916,
16 in the year of our Lord one thousand nine hundred and sixteen.

Whereas, the Court of Appeals of Kentucky in a suit depending in said Court, between the Louisville and Nashville Railroad Company as appellant and the said Jeanette Stewart administratrix of William H. Stewart, deceased, as appellee a judgment was rendered against the said Jeanette Stewart administratrix of William Stewart, deceased, and the said Jeanette Stewart administratrix of William H. Stewart, deceased, having obtained writ or error and filed a copy thereof in the Clerk's Office of the said Court to reverse the said Court in the aforesaid suit, and a citation directed to the said Louisville and Nashville Railroad Company, citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said Jeanette Stewart administratrix of the estate of William H. Stewart, deceased, shall prosecute her writ of error to effect, and answer all costs if she shall fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

NATIONAL SURETY COMPANY,
[SEAL.] By R. W. KEENON, *Attorney-in-Fact.*

Sealed and delivered in presence of
RODMAN W. KEENON,
Clerk Court of Appeals of Kentucky.

Approved by
SHACKELFORD MILLER,
Chief Justice of the Court of Appeals of Kentucky.

March 11, 1916.

17 Endorsed: 1916, March 11th, filed. R. W. Keenon, C. C. A.

And then on the same day of said term, the following Citation was filed herein, to-wit:

UNITED STATES OF AMERICA, *ss:*

In the Court of Appeals of Kentucky.

JEANETTE STEWART, Administratrix of the Estate of William H. Stewart, Deceased, Plaintiff in Error,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Defendant in Error.

To Louisville and Nashville Railroad Company, Defendant in Error, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of Kentucky, wherein Jeanette Stewart, administratrix of the estate of William H. Stewart, deceased, is plaintiff in error and the said Louisville and Nashville Railroad Company is defendant in error, to show cause, if any there be, why the judgments rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf,

18 Witness, the Honorable Shackelford Miller, Chief Justice of the Court of Appeals of Kentucky, this 11th day of March in the year of our Lord one thousand nine*teen* hundred and sixteen.

SHACKELFORD MILLER,
Chief Justice of the Court of Appeals of Kentucky.

Copy of the above citation received and service accepted, this 11th day of March, 1916.

B. D. WARFIELD,
Counsel for Louisville & Nashville Railroad Company.

Endorsed: 1916, March 11th, filed. Rodman W. Keenon, C. C. A.

Court of Appeals of Kentucky.

I, Rodman W. Keenon, Clerk of the Court of Appeals of Kentucky do hereby certify that the foregoing is a true and correct copy of the Præcipe and evidence of service of same, Assignment of Errors, Petition for Cross Writ of Error, Writ of Error as allowed, Bond of Jeanette Stewart as Administratrix, and Citation, showing return of service of same filed, by Jeanette Stewart, Administratrix of the etate of Wm. H. Stewart, deceased, plaintiff in error, on petition for cross writ of error, against the Louisville and Nashville Railroad Company, on record of appeal, in the case of Louisville and Nash-

19 ville Railroad Company, plaintiff in error, against Jeanette Stewart, Administratrix of the estate of Wm. H. Stewart, deceased defendant in error, now pending in the Supreme Court of the United States, all of which is now certified and transmitted to the Supreme Court of the United States.

In testimony whereof, witness my hand and seal as Clerk of the Court of Appeals of the Commonwealth of Kentucky this March 15th, 1915.

[Seal Kentucky Court of Appeals.]

RODMAN W. KEENON,
Clerk of the Court of Appeals of Kentucky.

Endorsed on cover: File No. 25,187. Kentucky Court of Appeals. Term No. 904. Jeanette Stewart, as administratrix of the estate of William H. Stewart, deceased, plaintiff in error, vs. Louisville & Nashville Railroad Company. Filed March 18th, 1916. File No. 25,187.

Office Supreme Court, U. S.
FILED
MAR 10 1916
JAMES D. MAHER
CLERK

3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 485.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - Plaintiff in Error,

versus

JEANETTE STEWART, AS ADMINISTRATRIX OF THE ESTATE OF WILLIAM H. STEWART, DECEASED, - Defendant in Error.

In Error to the Court of Appeals of the State of Kentucky.

BENJAMIN D. WARFIELD,
Counsel for Plaintiff in Error.

JAMES C. SIMS,
JOHN B. RODES,
Of Counsel.

March 7, 1916.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 485.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Plaintiff in Error,

versus

JEANETTE STEWART, AS ADMINISTRATRIX OF THE ESTATE OF WILLIAM H. STEWART, DECEASED,
Defendant in Error.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

This is a writ of error from this court to the Court of Appeals of Kentucky, to review its judgment which affirmed the judgment of the Circuit Court of Warren County, Ky. (Printed Record, pp. 218-222, 163 Ky. 823), awarding Defendant in Error (hereinafter styled plaintiff) eleven thousand eight hundred eighty-five dollars ($11,885.00) damages, apportioned to plaintiff, as widow, and to her three children (Printed Record, p. 114) for the death of plaintiff's husband, William H. Stewart, which is claimed to have resulted September 27, 1908, from injuries he received, while a locomotive engineer in the employment of Plaintiff in Error (hereinafter

styled defendant) at Cumberland City, Tenn., on September 5, 1908.

There were two trials of this case before juries in the Circuit Court of Warren County, Ky., resulting on both trials in verdicts and judgments for plaintiff; and two appeals therefrom by defendant to the Court of Appeals of Kentucky, on the first of which the judgment of the Warren Circuit Court was reversed, and the case remanded to that court for a new trial conformably to the opinion of the Court of Appeals of Kentucky (Printed Record, pp. 104-109, 156 Ky. 550, 157 Ky. 642); and on the second the judgment of the Warren Circuit Court in favor of plaintiff was affirmed (Printed Record, pp. 218-222, 163 Ky. 823). It is to the last judgment of said Court of Appeals of Kentucky that this writ of error is directed.

The record in this case is not as voluminous as it looks, so far as it is necessary for this court to consider the record on this writ of error. We call attention to the fact that by the cross-praecipe of plaintiff "portions of the record unnecessary to a proper presentation of the case have been incorporated into the transcript" (Printed Record, pp. 233, 234), contrary to the last literary paragraph of subdivision 1 of Rule 8 of this court; whereas all necessary parts of the record were called for by defendant's praecipe (Printed Record, 231-233). We refer particularly to the transcript of evidence on the first trial (Printed Record, pp. 29 to 100, inclusive), as a part of the record in the lower court which it was unnecessary to bring to this court.

STATEMENT.

The northbound freight train, from Paris, Tenn., to Bowling Green, Ky., composed of from 32 to 34 cars, of which Stewart was engineer, when it reached Cumberland City, met a southbound freight train, and also southbound passenger train No. 103. The railroad was single track and it was necessary for Stewart's train to take the siding there to let the two southbound trains by Stewart's train, together with several box cars which were already standing on the siding, and which were coupled to and shoved ahead of Stewart's engine when it entered upon the siding, and which extra cars plus Stewart's train were longer than that track. Therefore, in order to let the southbound freight train, which then stood waiting on the main track just north of the south switch of the siding, proceed, it was necessary for Stewart's train to be moved, together with the cars ahead of the engine, sufficiently far north on the siding to enable the rear of Stewart's train to clear the south switch, where the siding entered the main track. In order to do this, it was necessary according to the conductor's testimony, for Stewart's engine and the cars ahead of it to foul the main track at the north switch of the siding, *i. e.*, either to occupy the main track or to be so close to it as that it would not clear the southbound passenger train which was then about due at Cumberland City. Therefore, after the southbound freight train had departed, and in order that Stewart's train and the box cars ahead of it might be in the clear of the main track at the north switch, the con-

ductor, Jones, signaled the engineer, Stewart, to back the train. While doing so, and when the train had only moved a short distance, less than two car lengths, flagman Hill, who was at the rear of the train, seeing that if it continued to back, it would not only foul the main track at the south end of the switch, but would also split that switch, which was set and locked for the main track, thereby not only damaging the switch, but probably derailing the caboose, and delaying all traffic, and not having time to run to the switch and open it to enable the backing train to pass on to the main track, applied the air brakes by the use of the angle cock or stop cock on the rear end of the caboose, thereby stopping the train suddenly, and causing a jar to be felt in the engine. Stewart then had his head out of the engine window, and it is claimed that the jar occasioned by the application of the air brakes caused his head and shoulder to strike against the side of his engine cab, and to produce the injuries which resulted in his death 22 days later.

We shall discuss the evidence as to these transactions more in detail in connection with the argument of our second and third assignments of error.

ASSIGNMENTS OF ERROR.

The errors upon which defendant relies for a reversal of the judgment of the Court of Appeals of Kentucky, as shown by defendant's Assignments of Error (Printed Record, pp. 225-228) are these:

"First. The said Court of Appeals of Kentucky erred in entering judgment affirming the judgment of the War-

ren Circuit Court of Kentucky for the sum of eleven thousand eight hundred and eighty-five dollars ($11,-885.00), together with costs, interest and 10% damages, entered in error in favor of said Defendant in Error and against said Plaintiff in Error.

"Second. The said Court of Appeals of Kentucky erred in not reversing said judgment of the said Warren Circuit Court, and in not remanding said cause to said Warren Circuit Court for a new trial.

"Third. The said Court of Appeals of Kentucky erred in approving the refusal of said Warren Circuit Court to direct the jury, on the motion made in that behalf by the Plaintiff in Error, to find a verdict in favor of the Plaintiff in Error, on the ground that the evidence was insufficient to justify the submission of the case to the jury for its consideration; and said Court of Appeals of Kentucky erred in not reversing the judgment of said Warren Circuit Court for its refusal to direct the jury to find a verdict in favor of the Plaintiff in Error.

"Fourth. The said Court of Appeals of Kentucky erred in sustaining and approving the action of the Warren Circuit Court, as aforesaid, in giving to the jury, on said court's own motion, Instruction No. 4, as follows:

" 'No. 4. The court instructs the jury that in the operation of defendant's train it was the duty of the plaintiff's intestate as engineer to exercise ordinary care for his own safety, and if he failed to exercise such care, and his own negligence contributed in any way to produce the injuries, if any, complained of in the petition, then to the amount of such negligence, if any, attribu-

table to said Stewart, the jury shall diminish the damages, if any, which may be found by them, if any at all, under these instructions.'

"Said Instruction No. 4, to the giving of which to the jury Plaintiff in Error objected and excepted at the time, being erroneous in that it directed the jury to diminish the damages 'to the amount of' the employe's negligence, instead of, as required by Section 3 of the Employers' Liability Act of Congress, of April 22, 1908, directing the jury to allow only a proportional amount bearing the same relation to the full amount as the negligence attributable to the employer bears to the entire negligence attributable to both the employer and the employe.

"Fifth. The said Court of Appeals of Kentucky erred in sustaining and approving the action of the said Warren Circuit Court, and in holding that said court had committed no error, in giving to the jury, on the court's own motion, and over Plaintiff in Error's objection* and exception, Instruction No. 5, reading as follows:

" 'No. 5. The court instructs the jury that when the plaintiff's intestate entered the service of the defendant company as engineer, he assumed all the risks and hazards incident to that employment; and if the jury further believe from the evidence that flagman, O. L. Hill, stopped said train by the use of the air valve in the rear of the

*There is a clerical misprision, made either in copying the transcript of record for this court, or in printing the record, because the original Assignment of Error is correct, whereby it is recited that the instruction was given over **plaintiff's** objection; whereas it was given over **defendant's** objection, as the record otherwise shows. See defendant's bill of exceptions, Printed Record, 121, showing that defendant objected to the seven instructions given by the court on its own motion, including Instruction No. 5.

caboose, when it was necessary so to do, or when said flagman believed in the exercise of a reasonable judgment, in the prudent and careful operation of said train, it was necessary so to do, in order to avoid injury to property; and further believe that such stoppage of said train naturally and proximately resulted in the injury, if any, to said Stewart, complained of in the petition, then the law is for the defendant and the jury shall so find; unless, however, they shall further believe from the evidence that the necessity, if any, for the application of said emergency air brake had been brought about by defendant's agents or servants, in the negligent operation of said train prior to the application of said brake, in which event they will find for plaintiff.'

"Said Instruction No. 5 being erroneous because of the qualifying clause contained at the end of said instruction, reading as follows:

" 'Unless, however, they shall further believe from the evidence that the necessity, if any, for the application of said emergency air brake had been brought about by defendant's agents or servants, in the negligent operation of said train prior to the application of said brake, in which event they will find for plaintiff,'

as there was no evidence of negligence of any of Plaintiff in Error's agents or servants other than conductor Jones and flagman Hill, if they were negligent, which brought about the necessity for the application of the emergency air brake; and was also erroneous in directing the jury positively and without qualification to 'find for plaintiff' (Defendant in Error) if the necessity for the appli-

cation of the emergency air brake had been brought about by defendant's (Plaintiff in Error's) agents or servants in the negligent operation of the train; the qualification, which the trial court directed the jury would justify a verdict for the plaintiff (Defendant in Error) being obscure and misleading.

"Sixth. The Court of Appeals of Kentucky erred in sustaining and approving the action of the trial court in giving to the jury, on the court's own motion, and over the objection and exception of the Plaintiff in Error, Instruction No. 7, reading as follows:

" 'No. 7. Nine of the jury may find a verdict, but if less than the entire jury agree, then those who do agree must sign the verdict.'

"And said Court of Appeals of Kentucky also erred in sustaining and approving the action of the trial court in refusing to give to the jury Instruction C offered by defendant, Plaintiff in Error here, and which instruction reads as follows:

" 'C. The court instructs the jury that if they should find against defendant, all of the jury must agree to said verdict.'

"And to which said action of said trial court in refusing to give said Instruction C, Plaintiff in Error excepted at the time.

"Said Instruction No. 7 was erroneous, and the refusal to give said Instruction C was erroneous, in that thereby the jury was authorized to find a verdict by only nine, or ten, or eleven of the twelve jurors in violation of the Seventh Amendment of the Constitution of the United

States, a limitation upon Congress in enacting the Act of Congress known as the Federal Employers' Liability Act of April 22, 1908, upon which said Act this cause of action is founded, and a limitation upon every court and tribunal which entertains for trial causes of action, such as this one, arising under the said Act of Congress, this being a suit at common law where the value in controversy exceeds twenty dollars, and in which, by the said Seventh Amendment, right of trial by jury shall be preserved.

"Said Court of Appeals of Kentucky further erred in its construction of said Seventh Amendment of the Constitution of the United States, as applied to this cause, as shown by the opinion of Hannah, J., filed in said Court of Appeals of Kentucky for the said court, March 26, 1915 (163 Ky. 823), as follows:

" '3. It is also contended by appellant that the court erred in giving to the jury an instruction authorizing nine or more of the jury to return a verdict, and in refusing to give to the jury an instruction requested by appellant, requiring that the jury should all agree to a verdict; it being contended by appellant that in trials in the State courts of cases controlled by the Federal Employers' Liability Act, there must be a unanimous verdict of twelve men, as required by the Seventh Amendment to the Constitution of the United States; and that Congress had not power to grant jurisdiction to try causes of action created by it, upon State courts not so constituted as to satisfy the guarantee of the Seventh Amendment as to jury trials. And it is further contended by appellant

that Congress, by the Act of April 5, 1910, amending the Federal Employers' Liability Act, did not grant jurisdiction to State courts not so constituted as to satisfy the Seventh Amendment, to try causes of action under the Act mentioned.

" 'Since the filing of the appellant's brief herein, this court has considered the above-mentioned contentions and decided them adversely to appellant's claim. Ches. & Ohio R'y Co. v. Kelly's Admx., 161 Ky. 655; L. & N. R. R. Co. v. Johnson's Admr., 161 Ky. 824.' "

ARGUMENT.

1. Defendant's first assignment of error, that "**the said Court of Appeals of Kentucky erred in entering judgment affirming the judgment of the Warren Circuit Court of Kentucky for the sum of eleven thousand eight hundred and eighty-five dollars ($11,885.00), together with costs, interest, and 10% damages, entered in error in favor of said Defendant in Error and against said Plaintiff in Error,**" challenges the right of the Court of Appeals of Kentucky to affirm the judgment in this case with damages and interest, in that there is no provision in the Federal Employers' Liability Act authorizing the allowance of interest and damages in addition to compensation for loss of pecuniary benefits. "We may not piece out this Act of Congress by resorting to the local statutes of the state of procedure or that of the injury." (Michigan Central Railroad Co. v. Vreeland, 227 U. S. 59, 66.) "If the Federal statute was applicable, the

State statute was excluded by reason of the supremacy of the former under the National Constitution." (Second Employers' Liability Cases, 223 U. S. 1-53; Michigan Central Railroad Co. v. Vreeland, *supra;* St. L. & S. F. R. Co. v. Seale, 229 U. S. 156, 158; see also, Winfield v. Railroad Co., 216 N. Y. 284.)

The Federal Employers' Liability Act may not be supplemented by State law so as to authorize damages and interest such as is authorized by the law of the State in which the case is tried. This was ruled in Norton v. Erie Railroad Co. (Supreme Court of New York, Appellate Division), 148 N. Y. Supp. 771, the opinion in which reads as follows:

"The plaintiff seeks to have included in the judgment, interest upon the verdict from the time of the death of the plaintiff's intestate, as is provided by Section 1904 of the Code of Civil Procedure. I think that section has no application to this case, for the reason that the action is brought under the Federal Employers' Liability Act, and the verdict rests solely upon the claim arising under that act. The Federal statute is paramount and exclusive (Act, April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp., 1911, p. 1322) as amended by Act, April 5, 1910, c. 143, 36 Stat. 291 (U. S. Comp. St. Supp., 1911, p. 1325); Mondou v. N. Y., N. H. & H. R. R. Co., 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; Taylor v. Taylor, 232 U. S. 363, 34 Sup. Ct. 350, 58 L. Ed. ——, reversing 204 N. Y. 135, 97 N. E. 502, Ann. Cas. 1913D, 276), and the defendant's liability may not be extended by the provisions of our

statute. No provision is made in the Federal Act for adding such interest to the verdict, and I think the provisions of our statute may not be invoked for that purpose."

Accordingly, an order denying plaintiff's motion for a retaxation of costs was affirmed.

Following the Norton case the Supreme Court of Onondaga County, New York, in an opinion delivered January 22, 1916, in Mabel L. Griffin, Admx., v. N. Y. C. & H. R. R. Co., denied a motion to restore to the bill of costs originally filed an item of $1,125.00, representing interest on the verdict, under the Federal Employers' Liability Act, from the date of its rendition.

Therefore, if the judgment of the Court of Appeals of Kentucky should be affirmed in other respects, we ask that so much of said judgment as awards plaintiff interest on the verdict from the date of its rendition, and 10% damages on the supersedeas bond on affirmance, be reversed.

2. Defendant's second assignment of error is amplified and made more specific in its third assignment of error, and we will argue the two assignments together under the heading of the third assignment, to-wit:

"**Third. The said Court of Appeals of Kentucky erred in approving the refusal of said Warren Circuit Court to direct the jury, on the motion made in that behalf by the Plaintiff in Error, to find a verdict in favor of the Plaintiff in Error, on the ground that the evidence was insufficient to justify the submission of the case to the jury for its consideration; and said Court of Appeals of**

Kentucky erred in not reversing the judgment of said Warren Circuit Court for its refusal to direct the jury to find a verdict in favor of the Plaintiff in Error.''

(*a*) Under the Kentucky practice where, in the opinion of the defendant, the plaintiff fails to sustain the averments of actionable negligence alleged in the petition by competent proof, defendant moves the court to give to the jury a peremptory instruction to find for defendant. And this motion was made by defendant on the trial of this case in the Warren Circuit Court, both at the conclusion of plaintiff's testimony, and again at the conclusion of all the testimony (Bill of Exceptions, Printed Record, p. 119). But both motions were overruled, and this action of the trial court was approved by the Court of Appeals of Kentucky (Printed Record, p. 221). There is no evidence that Stewart was injured as a result of the negligence of the defendant, and a peremptory instruction to find in its favor should have been given. And this is a Federal question. St. L., I. M. & S. R'y Co. v. McWhirter, 229 U. S. 265; Seaboard Air Line R'y Co. v. Padgett, 236 U. S. 668; Seaboard Air Line R'y Co. v. Moore, 228 U. S. 434; Central Vermont R'y Co. v. White, 238 U. S. 507; Atlantic Coast Line R. R. Co. v. Burnette, 239 U. S. 199; North Carolina R. Co. v. Zachary, Admr. of Burgess, 232 U. S. 248; Seaboard Air Line R'y Co. v. Duvall, 225 U. S. 477; St. L., I. M. & S. R'y Co. v. Taylor, Admx., 210 U. S. 281.

In the McWhirter case, *supra* (229 U. S. 265), the question was as to whether or not there was a proximate connection in law between McWhirter's working over-

time, contrary to the Hours of Service Act, and his being run over by an engine after the time limit expired. The Kentucky courts held for the administrator. But this court reversed the judgment on the ground that "there was no proof tending to show a connection between the permitting of the working beyond the statutory time, and the happening of the accident. * * * Of course the inquiry whether there was any proof having such tendency is not to be solved by indulging in mere surmise or conjecture, or by resorting to imaginary possibilities, for to do so would but resolve the question back to the generic rule of liability as insurer which we have previously disposed of."

And, in speaking of its jurisdiction to review this question, the court said: "While it is true, as we have said, that coming from a State Court the power to review is controlled by Rev. Stat. 709 (identical with Judicial Code, 237), yet where in a controversy of a purely Federal character the claim is made and denied that there was no evidence tending to show liability under the Federal law, such ruling, when duly excepted to, is reviewable, because inherently involving the operation and effect of the Federal law." (Citing cases.)

In the White case, *supra* (238 U. S. 507), the question was as to whether the burden of proof rule of the *lex fori* as to contributory negligence applied or that of the Federal courts, in an action under the Federal Act in the State courts of Vermont. This court held that the Federal rule applied, saying: "Congress in passing

the Federal Employers' Liability Act evidently intended that the Federal statute should be construed in the light of these (before cited) and other decisions of the Federal courts. Such construction of the statute was, in effect, approved in Seaboard Air Line R'y v. Moore, 228 U. S. 434."

(*b*) Having established that this is a Federal question, it now devolves upon us to show to the court, if we can, that the question should be decided in our favor.

DEFENDANT WAS NOT NEGLIGENT ON THE OCCASION COMPLAINED OF, AND THE FEDERAL EMPLOYERS' LIABILITY ACT DOES NOT AUTHORIZE A RECOVERY EXCEPT FOR NEGLIGENCE.

The Federal Employers' Liability Act made no change in the substantive law of negligence. Actionable negligence for which the master is liable must be proved since, just as before, the Act.

As was said in Seaboard Air Line R'y v. Horton, 233 U. S. 492, 501: "It was the intention of Congress to base the action *upon negligence only, and to exclude responsibility of the carrier to its employes for defects and insufficiencies not attributable to negligence* (our italics). The common-law rule is that an employer is not a guarantor of the safety of the place of work or of the machinery and appliances of the work; the extent of its duty to its employes is to see that ordinary care and prudence are exercised, to the end that the place in which the work is to be performed and the tools and

appliances of the work may be safe for the workmen (citing cases). To hold that under the statute the railroad company is liable for the injury or death of an employe resulting from any defect or insufficiency in its cars, engines, appliances, etc., however caused, is to take from the act the words 'due to its negligence.' The plain effect of these words is to condition the liability upon negligence; and had there been any doubt before as to the common-law rule, certainly the act now limits the responsibilty of the company as indicated."

It is settled, that in an action by a servant to recover damages for injuries while in the master's employment, there is no presumption that the master was negligent. The doctrine *res ipsa loquitur* is not applicable. (Patton v. T. & P. R'y Co., 179 U. S. 658; T. & P. R'y Co. v. Barrett, 166 U. S. 617; Seaboard Air Line Railway Co. v. Moore, 228 U. S. 433; Northern Pacific R'y Co. v. Dixon, 139 Federal, 737; Midland Valley R. Co. v. Fulgham, 181 Federal, 91; Montbriand v. Chicago, St. P., M. & O. R'y Co., 191 Federal, 988.)

In the case at bar the alleged cause of the accident is that flagman Hill applied the air brake and stopped the train, as a result of which Stewart, the engineer, struck his head and shoulder against some part of his engine cab and was injured. In other words, it is asserted that Hill's act was the proximate cause of the accident. If his act was not negligence, in that he could not reasonably have anticipated that the injury to Stewart would follow as a result of the application of the air brake, then plaintiff's case falls to the ground.

The use by common carriers engaged in interstate commerce of air brakes on trains, is required by acts of Congress (U. S. Compiled Stat., 1901, Vol. 3, p. 3174; Act of March 2, 1903, 32 Stat., 943, c. 976). These acts were upheld in Johnson v. Southern Pacific R'y Co., 196 U. S. 1, and in subsequent cases. The evidence shows that, as required by said statutes, Stewart's train was equipped with air brakes, so arranged as that the engineer could apply the brakes and make an emergency stop of the train from the engine, or the conductor or brakeman could do the same thing by applying the angle cock that was in the caboose, or the stop cock at the rear of the caboose, or between any two cars in the train (Printed Record, pp. 145, 152, 160, 177, 71, 72); and that a rule of defendant provided that such application of the air should not be made "unless it is to avoid injury to life or property." (Printed Record, pp. 145, 161.)

The evidence further shows that the application of the stop cock by flagman Hill was in strict accordance with the rule, inasmuch as if he had not done so, the caboose would have run through and split the switch, thereby not only injuring it and delaying all traffic, but also, in all probability, some of the cars would have been derailed. (Printed Record, pp. 68, 151, 152, 178.)

The evidence also shows that the use of the emergency brakes for the purposes mentioned in defendant's rule was of frequent occurrence (Printed Record, pp. 63, 68, 70, 160, 161, 162), and that the ordinary effect of the application of the air brakes in emergency was not calculated to injure persons on the train or do any other

damage, and did not produce any more of a jerk to the train than is frequently felt in starting and stopping long freight trains, or while they are in motion (Printed Record, pp. 69, 140, 155).

Manifestly, Congress, in enacting the Safety Appliance Acts, *supra,* did not intend to require the doing of a vain or useless thing. If trains were to be required to be equipped with air brakes, Congress evidently further intended that they should be used by the trainmen in order to subserve the purpose which Congress had in mind in enacting the statutes. Certainly, Congress could not have intended to require railroads to use air brakes, and yet require that they should be used only at the carriers' peril.

If, then, as we contend, the air brake was a proper appliance to use to stop the train to prevent it from splitting the switch, damaging property and delaying all traffic, and it was then used with the same effect that always attends its use, it follows that such use did not constitute actionable negligence. Stewart, as a part of his contract of employment, assumed the risks incident to the service, including the risk of being thrown against his engine cab by the application of the air brakes from the rear of the train, as was done, just as the conductor and flagman would have done if Stewart had applied the air from the engine and had thereby jerked the caboose and injured the conductor or flagman if they had been in the caboose.

The language which we have quoted from the Horton opinion, *supra,* applies equally with respect to the al-

leged negligence of a fellow-servant, as it does to defects and insufficiencies in equipment, for the opinion says, "But, plainly, with respect to the latter as well as the former (negligence of other employes) ground of liability, it was the intention of Congress to base the action upon negligence only." The Horton case also held, as applicable to the question of Stewart's assumption of risk of being injured in the manner it is claimed he was injured: "It seems to us that § 4, in eliminating the defense of assumption of risk in the cases indicated, quite plainly indicates the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action." See, also, Southern R'y Co. v. Crockett, 234 U. S. 725, 730.

Having stated the propositions which we conceive the evidence tends to support, as affecting the question as to whether or not it was negligence as to Stewart for Hill to apply the stop cock, we will now, with some particularity, consider the evidence of conductor Jones, fireman Sorrells, flagman Hill, and brakeman Minor, who, with Stewart, constituted the train crew (and which four first-named persons are the only witnesses to the accident), as it pertains to the propriety of Hill's applying the stop cock; as to the effect of his so doing; and as to how this effect compared with that of applying the emergency brake on other occasions.

Before quoting from the record the evidence of the witnesses applicable to the propositions above stated, and in order that the court may more readily apply our argument, we think it advisable to refer to the salient

points of the two opinions of the Court of Appeals of Kentucky touching the evidence, and to point out the respects in which we conceive that court was in error in holding that the evidence sufficed to take the case to the jury, as well as to show that the opinion on the second appeal, to which this writ of error is prosecuted, not only can not be reconciled with the opinion on the first appeal, but plainly violates the rule that the opinion on the former appeal is the law of the case on subsequent appeals, to which rule that court is firmly committed. (Stewart's Admr. v. L. & N. R. Co., 136 Ky. 717; Western Union Tel. Co. v. Sutton, 140 Ky. 729; Goff v. Lowe, 141 Ky. 799.) Though this latter is probably a State, not a Federal, question.

In the opinion on the first appeal, the Court of Appeals of Kentucky, after fully and accurately stating the testimony with respect to Hill's applying the angle cock and stopping the train, held in accordance with our contention that there was no evidence which justified the submission of the case to the jury on that issue, saying: "It is urgently insisted for appellant that it was entitled to a peremptory instruction. We have given above the substance of the evidence, and must say that so far as the evidence shows any negligence upon the part of Hill, the rear flagman, appellant's contention should have been sustained." (Printed Record, p. 107.)

Conductor Jones did not testify on the first trial. All of defendant's crew of that train who testified at both trials were put on the witness stand by plaintiff. She did not introduce Jones as a witness on the first trial,

but did introduce him on the second trial. In the absence of Jones' testimony on the first trial, the Court of Appeals of Kentucky, as its opinion shows, conceived the opinion from the testimony of other witnesses that Jones was probably negligent in signaling the train to back when he knew, or should have known, that the switch at the south end of the siding was locked, and that Hill was not there to unlock it, and held that on another trial, if there was testimony to sustain that issue, the case should go to the jury thereon.

Our contention is that the view the Court of Appeals took of the question as to whether or not Hill was negligent, in the first opinion, was the law of the case on the second appeal; that there was no substantial difference in the testimony on the two trials as to the alleged negligence of Hill, and that the court also erred, on the second appeal, in holding there was evidence that Jones was negligent, sufficient to authorize the submission of that question to the jury. It is the Federal question as to whether or not the evidence on the second trial was sufficient to justify the submission of the case to the jury for its consideration that we are asking this court, in this division of our brief, to review, and upon which we ask this court to hold that the Warren Circuit Court erred in submitting the case to the jury, and that the Court of Appeals of Kentucky erred in approving such action of the trial court.

In discussing the evidence we refer to that given upon the second trial, to which this writ of error is directed (Printed Record, pp. 127-217), unless otherwise specified.

The figures in parentheses, not otherwise explained, refer to the pages in the printed record on which the evidence quoted or referred to in the brief may be found.

H. T. Jones, conductor of the train of which Stewart was engineer, testified that he signaled Stewart to back the train on the occasion when Hill applied the angle cock and arrested the backward movement. Stewart's head was out of the window on the right side of the engine, and he was looking at Jones. It was Stewart's duty to move the train in obedience to Jones' signals. Jones was asked what effect Hill's application of the air had, and replied that it stopped the train suddenly with "a sort of jerking effect." Jones did not know what effect this had on Stewart; did not see him thrown against the side of the cab. Jones said the siding held from 32 to 34 cars, and that he had 33 or 34 cars in his train, not counting the cars, the number of which he did not recall, that were standing on the side track, and which were coupled to and shoved ahead of Stewart's engine, while his train was on the siding, and which extra cars must be taken into account in making a computation as to whether or not it was possible for Stewart's train to have been in the clear at both ends of the siding. (The opinion on the second appeal is clearly in error in saying that the record does not conclusively establish that it was not and in intimating that all of Stewart's train, including the extra cars, "could have all been placed on the passing track, clearing the main line at the north end, and without the rear end extending past the south switch" (Printed Record, p. 220, at bottom of page). Jones said that the train

was backed possibly a car length or a car length and a half, at a speed of two or three miles an hour, before Hill stopped it. Jones could not say that the cars at the north end of the siding were then in sufficiently far to clear the main track. He was then asked (145): "Q. Now, what is the usual and customary way of applying that emergency, by whom is it ordinarily done? A. The emergency is applied ordinarily by the first person who sees danger and gets to the valve. If the engineer sees it first, he will apply it first. If the engineer does not see the danger, and it is observed from the rear of the train, then the flagman or conductor will apply it." Jones was asked if such was the usual procedure, and replied that the application of the emergency brake was an unusual procedure.

On cross-examination, Jones testified that in order to get the train on the side track into the clear of the main track at the south end, the rear of the train would have to be from 120 to 130 feet from the frog, and it is 50 feet further to the switch point (150). Of course, the same is true as to the north end of the switch. In other words, on every side track there are from 240 to 260 feet at the two ends where the track joins the main track that can not be occupied by cars on the siding without fouling the main track. The siding at Cumberland City is on the left, or north, side of the main track, and the station is between the side track and Cumberland River. There are three wagon and foot crossings over the side track. Jones testified that it was not his purpose, in signaling the train to back, that it should leave the siding and en-

ter the main track at the south end. Therefore, Hill, in stopping the train when it was about to foul the main track, was facilitating Jones' purpose. The caboose would have fouled the main track without even entering upon the switch at all, as heretofore explained (151): "Q. If the caboose had run upon the switch, it might have split the switch points, mightn't it? A. It would split them. Q. You had no purpose to permit that to occur? A. No, sir. * * * Q. What would be the possible or probable effect? A. It would split the switch and probably derail the car. Q. Would it damage or injure property? A. Yes, sir." Jones was then asked as to the effect upon the train of Hill's applying the air in emergency: "Q. State whether or not there are such jars usual and incident to and customary to the operation of such freight trains on that road? A. Practically every day."

W. C. Minor, head brakeman, who was sent out ahead of Stewart's engine to flag passenger train 103, testified that he saw Jones give Stewart the back-up signal and heard him answer it with three short blasts of the whistle; the train started back and was stopped by the emergency air brakes, applied from the rear of the train, but Minor did not see Hill apply the brakes, nor see him immediately before that time. "Q. What effect did it have on the train when he applied the air? A. Stopped the train at once. Q. What sort of jar or jerk did it put on the train? A. Well, it would put a jar on there as quickly as any emergency application. * * * Q. What effect did it have on the engine and those cars there, tell

how much it was, how much jar was there, I mean the train and the engine? A. It would be a jar equal to any emergency application of the brakes. * * * I don't know how to describe it. It is just a sudden stop, all the brakes were turned on and set in emergency and that made an immediate stop. Q. Well, does that cause a heavy jar in the train? A. Well, I should think so, to a certain extent." The train was not in the clear at the north end when it started to back. There were several cars on the siding ahead of the engine. Minor said that Stewart was a delicate man, given to complaining of his ill health and to taking medicine (156, 159, 161, 162): "Q. Was it usual and customary to apply the air brakes and put the train in emergency from the rear of the train? A. Not ordinarily; no, sir. Q. How is that ordinarily done, if it becomes necessary to set them in emergency? A. From the conductor's valve in the caboose. Q. Was that usually done by the conductor or the engineer? A. It would not be done by the engineer, for he would not know for what purpose they were using this emergency; it had to be done by the conductor. Q. I am talking about how it is done, isn't it a fact that it is usually applied by the engineer? A. It has been done by the engineer, but in a case of emergency from the train crew, it is done by the conductor in the caboose. Q. Then it is proper for a man to apply it from the rear? A. Yes, sir." Minor then testified that he could not say how many times he had applied the emergency, but that he had done it a time or two. On his cross-examination, Minor said the emergency was applied frequently (161);

that the reason he went out to flag 103 was because the main track was fouled at one end (160): "Q. I believe you told Mr. Proctor that there was a jerk or jar when it came to a sudden stop? A. Yes, sir; the same as any emergency application of the brakes. Q. Moving fast or slow? A. Slowly, I don't know how fast. Q. Did you see the jerk or jar of the train when it stopped? A. Yes, sir. Q. As an experienced railroad man, state whether or not in the operation of freight trains there are not naturally a lot of jerks and jars that can not be avoided, and which occur at any and all times in the operation of such trips (trains)? A. Yes, sir. Q. Said jerks and jars, are they or not usual and customary in the operation of such trains? A. Yes, sir. Q. Tell the jury whether or not this jar was like or similar to such other customary and ordinary jars in the operation of freight trains? A. I should think so, any emergency application of the brakes would be the same as this. Q. In stopping a freight train are there any jerks and jars? A. More or less; yes, sir. Q. In pulling it out are there any jerks or jars? A. Yes, sir. Q. In going down a swag, or fill, or a dip, are there any jerks or jars? A. Yes, sir. Q. In going into a dip as they go together there is a jerk and in going down the descent there would be another jerk of the slack running out of the train? A. Yes, sir. * * * Q. State how frequent you meet with such jars as you saw on that occasion in the operation of freight trains? A. That is very frequently that jars come like that, especially in any kind of trouble like that. Q. Does that happen frequently or otherwise?

A. It would happen frequently, you might say, in any kind of trouble when you would want to stop at any time. Q. State whether or not such jerks and jars as you saw on that occasion happen and occur almost daily in the operation of such freight trains? A. Yes, sir; I see it frequently (160, 161)." Minor explained that the latter sentence in defendant's rule governing the application of air brakes only applied to the engineer and was inapplicable where the air was applied from the train (161; also Sorrells, 170).

On redirect-examination, Minor testified (162): "Q. Now, do you tell Mr. Rodes, and do you mean to tell this jury that you see that emergency application applied daily on the trains? A. No, sir; not daily, but I said frequently. Q. Do you mean that it is frequently applied by the men in the ordinary business of the road? A. No, sir; I didn't say ordinary business, I said frequently in case of trouble? Q. You mean that it is applied somewhere on the road, but on no particular train? A. No sir; no particular train, but some train might use it. * * * Q. On the L. & N. road? A. That is what I mean. It might be applied in any case where it was necessary." Minor said he could not tell how many times he had applied the emergency brake.

T. A. Sorrells, fireman, testified that from his position on the engine he could not see Stewart when the emergency brakes were applied; did not know what his position then was; and did not see what, if any, effect the application of the brakes had on Stewart, but heard him say that he was thrown against the cab (164): "Q. What

effect did it have on the train? A. Just stopped the train. Q. What did you do? A. I didn't do anything. * * * Q. What happened to you when this train was put in emergency there? A. I was standing on the deck and I got overbalanced and caught against the tank. Q. What caused you to get overbalanced? A. The sudden stop of the train. Q. What was it you caught against? A. The tank. Q. What did you do then? A. Didn't do anything. Q. What did Stewart do? A. I don't know what he did, I didn't see him."

Sorrells testified that in a subsequent conversation with Stewart, the latter said he hit his head against the cab; "I went around there and asked him what was the matter and what was the brakeman trying to do, and he said he was trying to kill somebody he supposed." (Defendant's objection overruled; exception.) Sorrells said there were 6 or 8, or maybe more, cars ahead of the engine (165); that Stewart was in bad health. "I never had seen him well (166)." Sorrells did not see Hill.

On cross-examination, Sorrells said that he had seen Stewart taking medicine prior to the occasion complained of; had made several trips as fireman with Stewart; "He was a delicate man." It is uncontradicted in the evidence that Stewart continued to work regularly as engineer fro. September 5th, when the accident happened, until September 20th. He died September 27th. Sorrells testified that he continued on to Bowling Green with Stewart the day of the occurrence at Cumberland City, and made several other trips with him after that. Then this (167): "Q. After that trip did you ever hear

him make any complaint about that Cumberland City matter, or mention it? A. He never mentioned it to me at all after the day he was hurt." Sorrells identified a number of trip cards signed by Stewart, and showing trips that he made between the date of the accident and his death, on all of which trips, except two, Sorrells was Stewart's fireman, and during none of which did he hear Stewart complain (168, 169): "Q. Shortly before September 5, 1908, were you and Stewart in any wreck or derailment? A. Yes, sir, once. Q. Where? A. At McKinnon. Q. When was that? A. August 22, 1908. Q. Were you and Stewart both on the engine? A. Yes, sir. Q. What happened to the engine, and if he got any jar, what kind of a jar did he receive? A. We run over a derailer and got the engine and front trucks on the ground and ties. Q. Before getting off the track did it bump on the ends of the ties? A. Yes, sir. Q. Did the engine turn over? A. No, sir, the engine never turned over. Q. State whether or not as a railroad man under these circumstances, the engineer received any severe jerks or jars? A. He would get pretty good jars running over ties with the engine. Q. How about when it was derailed or thrown off the track? A. Oh, it was a pretty heavy jar when we run over that derailer and hit on the ties."

The testimony last quoted, taken in connection with that as to Stewart's illness in the preceding spring (Dr. Stone, 205), and as to his general bad health, as testified to by Minor and Sorrells, certainly raises a question as to whether the accident at Cumberland City, rather than

the accident at McKinnon and Stewart's general bad health, caused his death. Sorrells further testified (169): "Q. In the operation of all freight trains are there any jerks and jars necessarily incident to the operation of freight trains? A. Frequently we have jars in running through dips and the slack will run back. Q. In your judgment to give a measure of it, in a train of about 30 cars, about how much slack would there be? A. Something near a car length. Q. In the taking up of slack in the stopping of trains are there any jerks or jars? A. Possibly there would be. Q. Would the cars bump together? A. Yes, sir. Q. In going down dips, what kind of jars? A. The rear end will run up and hit the front end of the train and when you go out of the dip the slack will run out and cause a jerk. Q. In the operation of a train by the engineer, the engineer can make what is called a service application of the air brake can he not? A. Yes, sir. Q. State whether or not there sometimes occurs what is called a quick action triple in making service applications? A. They will go into emergency sometimes, it is frequently the case. Q. I will get you to state whether or not a jerk or jar of the train as it occurred there at Cumberland City was such as was usual and incidental and customary in the ordinary operation of freight trains? A. Well, sometimes we have jerks. * * * Q. In this instance was this jar hard or soft? A. Well, it was about a medium jar I suppose * * *."

On redirect-examination, Sorrells was asked if the emergency stop is not "recognized as a dangerous stop?" "A. They use that to keep from killing people and de-

stroying property. Q. And they are the circumstances under which it is justifiable to use it? A. That is what it is used for." (Recross-examination): "Q. You say it is used to prevent destruction to property or life either one? A. Yes, sir. Q. And that emergency can be applied either by the engineer or by the flagman in the rear? A. Yes, sir. * * * Q. Are there not many stops of the freight train that jerk and jar the train crew when there is no emergency application of the air brakes? A. Yes, sir."

O. L. Hill, flagman, who opened the stop cock and applied the air brakes on the train, testified that after his train headed in the side track he closed the switch back to the main track, thereby permitting the southbound freight train to pass out, and left the switch set for the main track. Then Hill's train began backing up and he stopped it by applying the angle cock at the rear end of the caboose (173): "Q. For what purpose did you apply that angle cock? A. So I could get to the switch in case he wanted to back out and throw the switch before he ran through it. I wanted to stop him before he ran through the switch. Q. You didn't know whether he wanted to back out or not? A I presumed he did by him backing up. * * * Q. Where were you when he began to back? A. Somewhere between the crossing at the south end of the side track and the middle crossing * * * about half way between the two crossings. * * * Q. How far was the caboose from the switch staff when it stopped? A. It was about half way over the crossing, I don't know how many feet.

* * * Q. When that train started backing, how far did it back before you applied the emergency? A. Possibly a car length or a car and a half. Q. Was the caboose north or south of you at the time it started backing? A. Bound to have been south of me. Q. Why? A. I was at the north crossing. Q. How far were you from the end of the caboose? A. Possibly three car lengths. Q. When it started backing what did you do? A. I gave them the stop signal. Q. Then what else did you do? A. Continued giving stop signals. Q. How many stop signals did you give? A. I don't know, until I saw he was not going to stop. Q. Then what did you do? A. I went and stopped him myself. Q. You didn't know for what purpose he was moving, you say? A. No, sir. Q. What speed was he going when you put the train in emergency? A. That would be hard to say. Q. Was he going exceeding a mile and a half an hour? A. Something like that, nor over that I shouldn't think. Q. Was that switch set for the main then? A. Yes, sir. Q. And what was your object you say in stopping that train? A. To prevent him running through the switch. Q. What else? A. That is what I say, and to keep in the clear for 103 was due at that time. Q. That was coming from the north wasn't it? A. Yes, sir. Q. You knew the north main was foul didn't you? A. No, sir. * * * Q. How many cars were on the siding when you got there? A. I didn't know, I found out afterwards. Q. You didn't know anything about the condition of the train at all? A. Not at the head end, no, sir; my duties are at the rear end. * * * Q. Do they ever

use the emergency to bunch the slack in a train? A. Yes, sir. Q. Is that often done or otherwise? A. Very frequently done. * * * Q. Now were you trying to bunch the slack on this occasion? A. Yes, sir, principally that. Q. And for what other purpose, if any? A. To prevent him from slacking out further than he did. Q. In other words you just wanted to stop him? A. Yes, sir, to keep him from backing out before I could get to the switch. * * * Q. Isn't it dangerous to life and to property to apply that emergency stop? A. I don't know that it is dangerous to life, it is dangerous to property sometimes, it very frequently pulls out drawheads. * * * Q. Mr. Hill I am requested to ask you if you didn't know at the time you applied that emergency, that the north end of your train still fouled the main? A. No, sir, I did not know it."

On cross-examination, Hill testified that he was then a conductor; that before and including the day of the accident, Stewart had complained of his health; had been taking medicine; and was delicate looking; that after the southbound freight train had gone he had started from the switch up to the second crossing "To open this crossing to allow traffic to cross," which was witness' duty under defendant's rules (177): "Q. As you were going there was any movement of the train made? A. I suppose I had got half way between the two crossings and they began backing up. * * * Q. What became of you then as he started back? A. I looked ahead and looked back trying to figure out what they were doing and I gave them stop signals. Q. How far was the

caboose from that switch at that time? A. I would not be positive in feet. Q. How about its relation to the first crossing? A. They were about a half car length north of that crossing when they started backing up. * * * Q. About where did that caboose get out of the clear, or was it out of the clear? Where did it have to be to be in the clear? A. It had to be just north of this crossing to be in the clear, the caboose if it blocks the south crossing at Cumberland City it is out of the clear, and that is the first crossing after you enter the switch along about that livery stable. Q. And as it went back the caboose got out of the clear then? A. Yes, sir." The crossing is about 100 feet from the switch. "Q. Now you say you gave the signal? A. Yes, sir, the stop signal. Q. Did you give it more than once? A. Yes, sir, two or three times. Q. Which way were you going? A. Running towards the rear end. * * * Running on the main. Q. Was your stop signal obeyed? A. No, sir. Q. When you saw it was not obeyed, what did you do? A. I used the angle cock to stop him. Q. If that caboose had continued further and run out further what would have happened? A. Run out and split the switch, derailed a car, and possibly damaged the caboose and two or three cars. Q. State whether or not it was your duty to stop the train? A. Yes, sir, to save myself from suspension and also the company from loss on it." Hill was then asked why he did not get to the switch and open it so as to let the train back on to the main track, and he explained that it was because he did not have time. And we think he makes this proposition

perfectly clear. "Q. Under the rules of the company is it your duty to apply the angle cock in emergency to protect the company's property? A. Yes, sir. * * * Q. Did the stopping of that train cause any jerk or jar? A. It didn't in the rear end. Q. Is or not some jerking or jarring incident to every stop? A. Oh, yes, any freight train stop, you can't prevent that. Q. State whether or not such jerking or jarring as must have happened on that occasion was the usual and customary jerking and jarring ordinarily met with in the operation of freight trains? A. Every day of the world. Q. Under the rules of the company is there any other method of applying that angle cock except to pull it open and keep it open? A. No, sir, they never do it any other way. Q. And that is the way you applied it? A. Yes, sir."

On redirect-examination, Hill testified (179): "Q. Now you say that the emergency as it was applied that day, is applied for the purpose of stopping cars every day? A. Yes, sir, I don't guess there is hardly a day that goes by that some one don't use it that way." Hill said he did not mean to say that every crew used it every day.

On recross-examination Hill testified that at the time he applied the air at the caboose "one corner of the caboose was positively out of the clear fouling the main. (Redirect, 180): "Q. Do you mean to say that when it stopped it had fouled the south main? A. Yes, sir."

We submit that the testimony, properly construed, did not justify the statement made in the opinion of the

Court of Appeals on the second appeal (Printed Record, 221), that "there was some evidence of negligence upon the part of Hill, the rear brakeman, in acting too hastily, and in assuming that the purpose of the conductor was to back the rear end of the train over the closed south switch, or that it would be necessary to do so in order to clear the main line at the north switch." We understand it is upon these grounds that the court held that the case was properly submitted to the jury on the second trial as to Hill, although the opinion on the first trial held that it was not proper for the trial court to submit the case to the jury as to Hill (Printed Record, 107). That Hill did not act "too hastily," is established by his uncontradicted testimony that before applying the air brake he made an ineffectual attempt to signal the engineer, by giving him two or three signals to stop, which were not obeyed. It was not until Hill realized that his signals would not be obeyed, and that the backing of the train would split the switch, probably derail one or more cars and obstruct the main track, that he applied the air. This does not show either too much haste or lack of judgment. And, concerning the other ground upon which the Court of Appeals of Kentucky held that the case was properly submitted to the jury as to Hill on the second trial, notwithstanding the opinion on the first trial to the contrary, we think the court was clearly in error in concluding that if Hill had not stopped the train it would not have fouled the main track at the south switch, and yet would have been in the clear of the main track at the north switch. In fact, Hill's uncontradicted evidence is

that when he stopped the train the caboose would not then clear at the south switch a train passing on the main track.

We think it is sufficient to say of the testimony of plaintiff's witnesses, Neill, James, Phelps, Gray, Suttle and Hagan, that it is immaterial for these two reasons: (1) They had not been in railroad service for many years before they testified and were unacquainted with railroad operations as conducted at the time of the accident. (2) Defendant's printed rule as to the purposes for which the emergency air brake should be used was the best evidence of what the rule meant, and its construction was a question of law for the court, and not a question for the opinion of witnesses, to go to the jury for their determination.

The testimony on the second trial makes no reference to the question as to whether Jones could see Hill, or Hill could see Jones, when Jones signaled the train to back and when Hill signaled the train to stop and applied the angle cock. But on the first trial Hill testified (62): "Q. You don't know what they were doing at the head end, nor what signals were given at the head end? A. No, sir."

We submit that under this testimony, neither Hill nor Jones was negligent as to Stewart on the occasion complained of. In an action by the servant against the master to recover damages for personal injuries, it is not the policy of the law to magnify the rights of the servant and to minimize the rights of the master. And it is only

by magnifying the rights of the servant in this case that anything that was done by Hill or Jones on the occasion in controversy, can be expanded into actionable negligence respecting Stewart. What was then done is a matter of frequent occurrence. That it could not reasonably have been expected to result in injury to Stewart or anyone else is demonstrable from the fact that injuries to persons on trains upon which air brakes are applied in emergency are so infrequent as to be negligible. A person is only responsible in law for the consequences which may reasonably be expected to flow from his acts. Such a consequence as happened on that occasion could not reasonably have been so expected. If we may be permitted to indulge in conjecture, it seems to us the probability is that the only reason Stewart was thrown against the side of the engine cab when the air brakes were applied, if he was so thrown, was because his careless position at the moment exposed him to that result. And in this he was contributorily negligent. Sorrells' equilibrium was disturbed at the same time, but he steadied himself by putting his hand against the tank. In 99 times out of 100, or 999 times out of 1000, probably, Stewart would have protected himself by taking hold of something, just as Sorrells did.

We think we have demonstrated, and the Court of Appeals of Kentucky so held on the first appeal, that Hill was not negligent. If he was not, then, manifestly, the trial court erred in submitting the case to the jury as to the alleged negligence of Hill. And inasmuch as it is impossible to say that the jury would have found for

plaintiff at all, or that their verdict would have been the same, if the court had withdrawn the case from the jury as to Hill and had submitted it only as to Jones, it necessarily follows that the judgment was erroneous and should be reversed, even though the court should be of opinion that Jones was negligent as to Stewart on that occasion. (Seaboard Air Line R'y Co. v. Horton, 233 U. S. 492; Same v. Padgett, 236 U. S. 668.) But for the erroneous ruling of the trial court in submitting the case to the jury as to Hill, the result of the action of the jury might have been different. (North Carolina R. Co. v. Zachary, etc., 232 U. S. 248, 256.) Therefore, as we have said, even if there was evidence to submit the case to the jury as to Jones alone, inasmuch as the case was submitted not only as to him, but also as to Hill, and the other employes who were clearly not negligent at all, and since it is impossible to know how the jury would have found if the case had been submitted only as to Jones, a new trial should be granted for such error of the court.

But we also contend that the case should not have been submitted to the jury as to Jones. Even if he should not have signaled the train back until Hill had thrown the south switch for the main track, and even though this would have been negligence as to some other person if he had been injured, it was not negligence as to Stewart, because: (*a*) the risk of being injured from that cause was one which Stewart assumed in entering and remaining in defendant's service; and (*b*) the injury to Stewart was one which Jones could not reasonably

have foreseen as a consequence of his causing the train to be backed.

In St. L. & S. F. R. Co. v. Conarty, 238 U. S. 243, absence of safety appliances intended to obviate the necessity of men going between the ends of the cars, was held not actionable negligence in an action for the death of an employe in a collision between the defective car and a switch engine. No coupling was being made.

In St. L., I. M. & S. R'y Co. v. McWhirter, 229 U. S. 265, *supra,* McWhirter, a brakeman, was run over in going down over the front end of a moving locomotive to run ahead and set a switch. He had been on duty longer than the Act of Congress regulating hours of service permitted. Held: That this negligence was not the proximate cause of his injury. Mr. Chief Justice White said:

"Of course the inquiry whether there was any proof having such tendency is not to be solved by indulging in mere surmise or conjecture, or by resorting to imaginary possibilities, for to do so would but resolve the question back to the generic rule of liability as insurer, which we have previously disposed of."

In the case at bar the injury can only be ascribed to the stopping of the train by mere surmise and conjecture. Hill could not have anticipated that an emergency stop required by the rules would injure anyone. His act is not negligent unless he could reasonably expect the result. The judgment in this case depends on surmise and conjecture, not proof.

3. The defendant's next assignment of error challenges the correctness of the instruction given the jury by the trial court as to their duty to diminish the damages because of Stewart's contributory negligence. Said assignment of error reads as follows:

"Fourth. The said Court of Appeals of Kentucky erred in sustaining and approving the action of the Warren Circuit Court, as aforesaid, in giving to the jury, on said court's own motion, Instruction No. 4, as follows:

" 'No. 4. The court instructs the jury that in the operation of defendant's train it was the duty of the plaintiff's intestate as engineer to exercise ordinary care for his own safety, and if he failed to exercise such care, and his own negligence contributed in any way to produce the injuries, if any, complained of in the petition, then to the amount of such negligence, if any, attributable to said Stewart, the jury shall diminish the damages, if any, which may be found by them, if any at all, under these instructions.'

"Said Instruction No. 4, to the giving of which to the jury Plaintiff in Error objected and excepted at the time, being erroneous in that it directed the jury to diminish the damages 'to the amount of' the employe's negligence, instead of, as required by Section 3 of the Employers' Liability Act of Congress, of April 22, 1908, directing the jury to allow only a proportional amount bearing the same relation to the full amount as the negligence attributable to the employer bears to the entire negligence attributable to both the employer and the employe."

Instruction No. 4 is erroneous on the ground pointed out by this court in N. & W. R'y Co. v. Earnest, 229 U. S. 114, 121, 122, in that it directed the jury, if they found Stewart was negligent "to the amount of such negligence, if any, attributable to said Stewart, the jury shall diminish the damages, if any, which may be found by them, if any at all, under these instructions." In other words, as said in the Earnest case, *supra:* "The thought which the instruction expressed and made plain was that, if the plaintiff had contributed to his injury by his own negligence, the diminution in the damages should be in proportion to the amount of his negligence. * * * Those words were not happily chosen, for to have reflected what the statute contemplates they should have read, 'as compared with the combined negligence of himself and the defendant.' We say this because the statutory direction that the diminution shall be 'in proportion to the amount of negligence attributable to such employe' means, and can only mean, that, where the causal negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional amount bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both; the purpose being to abrogate the common-law rule completely exonerating the carrier from liability in such a case and to substitute a new rule confining the exoneration to a proportional part of the damages corresponding to the amount of negligence at-

tributable to the employe. Second Employers' Liability Cases, 223 U. S. 1, 50."

In Seaboard Air Line R'y v. Tilghman, 237 U. S. 499, in discussing an erroneous "diminution of damages" instruction, the court said: "No reference was made to the rule of proportion specified in the statute or to the occasion for contrasting the negligence of the employe with the total causal negligence as a means of ascertaining what proportion of the full damages should be excluded from the recovery. On the contrary, the matter of diminishing the damages was committed to the jury without naming any standard to which their action should conform other than their own conception of what was reasonable. In this there was a failure to give proper effect to the part of the statute before quoted. It prescribes a rule for determining the amount of the deduction required to be made and the jury should have been advised of that rule and its controlling force. It results that the objection to the instructions upon this subject was well taken and should have been sustained."

4. Defendant's fifth assignment is that **the trial court erred in giving to the jury, and the Court of Appeals of Kentucky erred in approving, the qualifying clause in Instruction No. 5, which is quoted in italics below:**

"No 5. The court instructs the jury that when the plaintiff's intestate entered the service of the defendant company as engineer, he assumed all the risks and hazards incident to that employment; and if the jury believe from the evidence that flagman O. L. Hill stopped said

train by the use of the air valve in the rear of the caboose, when it was necessary so to do, or when said flagman believed in the exercise of a reasonable judgment, in the prudent and careful operation of said train, it was necessary so to do, in order to avoid injury to property; and further believe that such stoppage of said train naturally and proximately resulted in the injury, if any, to said Stewart, complained of in the petition, then the law is for the defendant and the jury shall so find; ***unless, however, they shall further believe from the evidence that the necessity, if any, for the application of said emergency air brake had been brought about by defendant's agents and servants, in the negligent operation of said train prior to the application of said brake, in which event they will find for plaintiff.***"

(a) There was no attempt to prove, and no evidence of, negligence on the part of any of defendant's servants, other than Stewart, except conductor Jones and flagman Hill, if they were negligent, which brought about the necessity for the application of the emergency air brake, and the qualification to Instruction No. 5 was erroneous for that reason, in that the jury had the right to infer that the court was of opinion that there was evidence of negligence in defendant in other respects than as affecting the conduct of Jones and Hill. The instruction violates a cardinal rule that it is always error to instruct a jury upon an issue there is no evidence to support, or to give an instruction with reference to a state of facts not in evidence.

(b) The qualification was also erroneous in directing the jury positively and without qualification to find for

plaintiff, if the necessity for the application of the emergency air brake was brought about by defendant's servants in the negligent operation of the train prior to the application of the brake; the qualification, which the trial court directed the jury would justify a verdict for plaintiff, being obscure and misleading. To what negligent operation does the language refer? Does it mean that if Jones should not have signaled the train to back when he did, that this made Hill's act negligent, whereas, otherwise, it would have been innocuous? Or, does the reference to "the negligent operation of the train prior to the application of the brake," refer to some other act, done on some other occasion? We can not tell, nor could the jury, what the language means.

(c) Furthermore, the qualification is erroneous in the use of the words "brought about by defendant's servants." This may refer to Sorrells and Minor, as well as to Jones and Hill. But there is no evidence, or attempt to prove, that either Sorrells or Minor was negligent. The language, if used at all, should have been limited to Jones and Hill.

(d) But, more especially, the qualification, if it was meant to refer to the act of Jones in signaling the train back when he did, is erroneous in assuming that there was an issue of fact for the jury to decide as to whether he was negligent as to Stewart. As we have argued in the second division of this brief, we do not think there was an issue of negligence, under the evidence, either as to Jones' signaling the train to back, or as to Hill's applying the emergency brake. The question was one of

law for the court, which it should have decided by instructing the jury to find for defendant.

(e) To make the quality of Hill's act to depend upon a preceding act of some other person, over whom he had no control, and from whom he was too far away to confer or remonstrate with him, seems to us to violate a plain principle of justice. Hill either had the right, under defendant's rule, the applicable part of which we have quoted, to angle cock the train and prevent it from running through the switch, thereby damaging the switch, delaying transportation, and, probably derailing cars, and destroying other property, or he did not have such right. And this question should not be confused with, or made dependent upon, the further question as to what some one else did, or omitted to do, prior to Hill's act.

5. Defendant's sixth, and last, assignment presents the question, argued in a separate brief for Plaintiffs' in Error in all of the cases, including this one, which were advanced to be heard with No. 321, as one case, and presented also in that case, to-wit:

The Seventh Amendment to the Constitution of the United States inheres in causes of action created by the Act of Congress known as the Employers' Liability Act, whether tried in State courts or in Federal courts, and a State Court that can not or will not afford a trial of such a cause by a jury of twelve men whose verdict is unanimous, as at common law, is not a competent court to entertain such causes of action, by virtue of the Amendment of April 5, 1910, to Section 6 of the Act of April 22,

1908; Section 28, Judicial Code, March 3, 1911; or otherwise.

As our sixth assignment shows (Printed Record, 227), defendant raised this question in the trial court by offering Instruction "C. The court instructs the jury that if they should find against defendant all of the jury must agree to said verdict," which the court refused to give, and defendant duly excepted; and by excepting to the action of the court in giving to the jury Instruction: "No. 7. Nine of the jury may find a verdict, but if less than the entire jury agree, then those who do agree must sign the verdict." This instruction was in accordance with Carroll's Kentucky Statutes, 1915, §2268, enacted pursuant to permission conferred on the Legislature by §248, Ky. Constitution, and which statute closely follows the language of the Constitution, to-wit: "That in all trials of civil actions in the Circuit courts, three-fourths or more of the jurors concurring may return a verdict, which shall have the same force and effect as if rendered by the entire panel. But where a verdict is rendered by a less number than the whole jury, it shall be signed by all the jurors who agree to it."*

In this case, the verdict was ostensibly the unanimous verdict of the jury (Printed Record, 113, 114). But it seems to us this is unimportant. The merely accidental circumstance that the verdict does not show that any of the jurors dissented from it can not affect the great constitutional question involved, for at least two reasons: (*a*) A circuit court in Kentucky has no jurisdiction to

*See Appendix, p. 50.

entertain a cause of action created by the Employers' Liability Act, because it can not enforce the common-law requirement as to a unanimous verdict by twelve men, nor refuse to receive a verdict rendered by more than eight of the twelve jurors, unless it is subject to some other legal objection. The fact that in a Kentucky court a verdict, apparently unanimous, *may* be obtained is not enough to give the court jurisdiction. The court must be one in which *it is not possible* that judgment can be rendered for either side, except upon a unanimous verdict. (*b*) The test of a verdict that satisfies the requirements of the Seventh Amendment, is not to be found in the fortuitous circumstance that the verdict was ostensibly unanimous, but in the instruction which the court gave to the jury on that subject. When a jury of twelve men are told by the court that nine or more of their number can make a verdict, the fact that they were so told would naturally influence those who were not in favor of the verdict to agree to it, since they could not prevent it if as many as nine jurors favored it. Those of us who are acquainted with jury practice in Kentucky since the fractional verdict statute was enacted, well know the reluctance of jurors to have it known how they stood where less than all of them agree to the verdict, and that many apparently unanimous verdicts are rendered which would not be rendered if juries were instructed in accordance with Instruction C asked by defendant in this case, that "The court instructs the jury that if they should find against defendant all of the jury must agree to said verdict."

We merely indicate, thus briefly, the state of the record in this case on this jury question, leaving the argument of the question to the other, joint, brief for all the Plaintiffs' in Error, above referred to.

For all of the reasons we have argued, we respectfully ask that the judgment of the Court of Appeals of Kentucky be reversed, annulled and held for naught.

Respectfully submitted,

BENJAMIN D. WARFIELD,
Counsel for Plaintiff in Error.

JAMES C. SIMS,
JOHN B. RODES,
Of Counsel.

March 7, 1916.

APPENDIX.

Section 248, Kentucky Constitution:

"* * * The General Assembly may provide that in any or all trials of civil actions in the Circuit courts, three-fourths or more of the jurors concurring may return a verdict, which shall have the same force and effect as if rendered by the entire panel. But where a verdict is rendered by a less number than the whole jury, it shall be signed by all the jurors who agree to it."

Section 2268, Kentucky Statutes:

"That in all trials of civil actions in the Circuit courts, three-fourths or more of the jurors concurring may return a verdict, which shall have the same force and effect as if rendered by the entire panel. But where a verdict is rendered by a less number than the whole jury, it shall be signed by all the jurors who agree to it."

Office Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. [redacted]904

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - Plaintiff in Error,

versus

JEANETTE STEWART, as Administratrix of the Estate of William H. Stewart, Deceased, - - - - - - - - - Defendant in Error.

Brief of Plaintiff in Error in Support of its Motion to Quash, with Costs, the Paper Purporting to be Defendant in Error's Cross-Writ of Error Herein.

BENJAMIN D. WARFIELD,
Counsel for Louisville & Nashville Railroad Company.

JAMES C. SIMS,
JOHN B. RODES,
Of Counsel.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 485.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Plaintiff in Error,

vs.

JEANETTE STEWART, AS ADMINISTRATRIX OF THE ESTATE OF WILLIAM H. STEWART, DECEASED,
Defendant in Error.

MOTION OF PLAINTIFF IN ERROR TO QUASH CROSS-WRIT OF ERROR HEREIN, BRIEF IN SUPPORT THEREOF, AND PROOF OF SERVICE.

And now comes the Louisville & Nashville Railroad Company, plaintiff in error herein, by Benjamin D. Warfield, its attorney and counsel, and moves to quash, with costs, the paper purporting to be a cross-writ of error herein taken out by the above-named Jeanette Stewart, as administratrix of the estate of William H. Stewart, deceased, upon the grounds stated in the annexed argument.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
By Benjamin D. Warfield, *its Attorney.*

JAMES C. SIMS,
JOHN B. RODES,
Of Counsel.

The undersigned, of counsel for defendant in error, Jeanette Stewart, as administratrix, hereby acknowledges receipt of this notice of motion, and of the brief hereto annexed. This March , 1916.

Counsel for Defendant in Error.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 485.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Plaintiff in Error,

vs.

JEANETTE STEWART, AS ADMINISTRATRIX OF THE ESTATE OF WILLIAM H. STEWART, DECEASED,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR IN SUPPORT OF ITS MOTION TO QUASH, WITH COSTS, THE PAPER PURPORTING TO BE DEFENDANT IN ERROR'S CROSS-WRIT OF ERROR HEREIN.

In support of plaintiff in error's motion to quash, with costs, the paper purporting to be a cross-writ of error herein taken out by the above-named Jeanette Stewart, as administratrix of the estate of William H. Stewart, deceased, plaintiff in error says:

RGUMENT.

1. The proposed writ of error was applied for and allowed too late.

2. The judgment which defendant in error is seeking by said writ of error to have reviewed is not a final judgment to which a writ of error will lie.

3. There is no merit in defendant in error's favor in the questions which she is thus seeking to have reviewed; and even if the Court were to take jurisdiction of such writ of error, the only order the Court would make would be an affirmance of the judgment of the Court of Appeals of Kentucky, which reversed, on the first appeal, the judgment of the Warren Circuit Court on the first trial of the cause.

Of these in their order:

I.

The judgment of the Court of Appeals of Kentucky which defendant in error, by her writ of error, is proposing to have this Court review was rendered December 19, 1913 (Printed Record, page 104), and became final February 27, 1914 (Printed Record, pages 109, 110). Defendant in error's writ of error was not applied for and allowed, over plaintiff in error's objection and exception as shown therein, by the Chief Justice of the Court of Appeals of Kentucky, until March 11, 1916, which was more than two years after the judgment became final, and it comes too late (Foster's Federal Practice, Vol. 3, Section 698, page 2456, and notes to that section).

It seems also to be too late because not prosecuted at the same term of this Court to which plaintiff in error prosecuted its writ of error, and which was the October term, 1914, since the record was filed in this Court, June 1, 1915, which was before the October term, 1914, of the Court closed, said writ of error having been allowed by

the Chief Justice of Kentucky April 30, 1915 (Printed Record, page 223). See Grigsby v. Purcell, 99 U. S. 505; United States v. Burchard, 125 U. S. 176; The S. S. Osborne, 105 U. S. 447; The Tornado, 109 U. S. 110; Hilton v. Dickson, 108 U. S. 165; holding that cross-appeals must be prosecuted like other appeals, and that the rule as to cross-writs of error is the same as is the rule as to cross-appeals.

On both of the grounds argued, we ask the Court to dismiss the cross-writ of error because allowed and filed too late.

II.

The judgment defendant in error seeks to have this Court review was not a final judgment, and, therefore, is not the subject of review by this Court. In reversing that judgment, the opinion of the Court of Appeals of Kentucky concluded with the words: "For the reasons indicated the judgment is reversed, with direction to grant appellant a new trial and for further proceedings consistent herewith."

And, as the record shows, a new trial was had in the lower court, as directed by the judgment of the Court of Appeals, and on such retrial plaintiff (defendant in error) recovered another judgment against defendant (plaintiff in error), from which the latter prosecuted its appeal to the Court of Appeals, which affirmed said second judgment (Printed Record, pages 218-222), and thereby ended the litigation so far as the courts of Kentucky were concerned. Thereupon defendant prosecuted

its writ of error from this Court to review said judgment of affirmance rendered by the Court of Appeals of Kentucky. That was a final judgment, to which the writ of error of this Court lies. But that was the only final judgment of that court to which a writ of error from this Court does lie. The action of the Court of Appeals of Kentucky in reversing the first judgment was not a final order, and this Court will not review such action of that court. (Foster's Federal Practice, *supra,* Vol. 3, Section 695, page 2421, and cases cited in notes thereto); Tracy v. Holcombe, 24 Howard, 426, where Chief Justice Taney said:

"This case has been brought here by a writ of error directed to the Supreme Court of the State of Minnesota. But, upon looking into the transcript, it appears that the judgment which it is proposed to revise is a judgment reversing the decision of the court below, and awarding a new trial. There is, therefore, no final judgment in the case, and the writ must be dismissed for want of jurisdiction in this Court."

In Brown v. Union Bank of Florida, 4 Howard, 465, the Court, speaking through Justice McLean, in sustaining a motion to dismiss the writ of error, said:

"The judgment below reversed the judgment of an inferior court, and remanded the cause to that court with instructions to award a *venire facias de novo;* it was, therefore, not a final judgment, on which only a writ of error can issue."

Pepper v. Dunlap, 5 Howard, 51; McComb v. Commissioners, 91 U. S. 1; Moore v. Robbins, 18 Wallace, 588.

In Johnson v. Keith, 117 U. S. 199, the Court sustained a motion to dismiss a writ of error "prematurely and improvidently sued out and issued," where the highest court of a State had reversed a judgment and remanded the case to the trial court for further proceedings, in conformity with the opinion, saying:

"This motion is granted. A judgment of reversal, accompanied by an order remanding the cause for a retrial, is not a final judgment for the purposes of a writ of error to this Court. Houston v. Moore, 3 Wheat. 433; Bostwick v. Brinkerhoff, 106 U. S. 4, and cases there cited."

In Mower v. Fletcher, 114 U. S. 127, in denying a motion to dismiss a writ of error on the ground that the judgment sought to be reviewed was not final, this Court said:

"The judgment in each case is that the judgment of the State District Court 'be and the same is hereby, reversed with costs, with directions to the Superior Court of Los Angeles County to enter judgment upon the findings for the plaintiff as prayed for in his complaint.'

"That judgment is final for the purposes of a writ of error to this Court, which terminates the litigation between the parties on the merits of the case, so that, if there should be an affirmance here, the court below would have nothing to do but to execute the judgment it had already rendered. *Bostwick* v. *Brinkerhoff*, 106 U. S. 3,

and the numerous cases there cited. The judgments in these cases are of that character. The litigation is ended, and the rights of the parties on the merits have been fully determined. Nothing remains to be done but to require the inferior court to perform the ministerial act of entering the judgments in that court which have been ordered. This is but carrying the judgment of the Supreme Court which has been rendered into execution. Nothing is left to the judicial discretion of the court below. The cases relied on in support of the motions to dismiss were all judgments or decrees of reversal, with leave for further proceedings in the inferior court. Such judgments are not final, because something yet remains to complete the litigation."

In Parcels v. Johnson, 20 Wallace, 653, in dismissing a writ of error, this Court said:

"A writ of error can only issue from this Court to the highest court of a State for a review of the final judgment or decree of that court in a suit. In other words, it is only the last judgment or the last decree which the State courts can give in a suit, until that judgment or decree is set aside or reversed, that this Court can, even in the prescribed cases, bring here for re-examination. The judgment of the Supreme Court of Missouri, brought up in this case, is one of reversal only and remanding the suit to the inferior court for further proceedings in accordance with the opinion delivered and filed. The cause was sent back, therefore, for a new trial or a new hearing. Upon such trial or hearing the inferior court can proceed

to render a new judgment, not inconsistent with the opinion, and that judgment may in its turn be taken to the Supreme Court for examination."

In Bostwick v. Brinkerhoff, 106 U. S. 3, the Court said:

"It has not always been easy to decide when decrees in equity are final within this rule, * * * *but in the common law courts the question has never been a difficult one.* (Our italics.) If the judgment is not one which disposes of the whole case on its merits, it is not final. Consequently it has been uniformly held that a judgment of reversal with leave for further proceedings in the court below can not be brought here on a writ of error." (Citing cases.) This is just what the reversal of the first judgment by the Court of Appeals of Kentucky in the case at bar did. And such proceedings were had, as we have seen, with the result above stated.

This rule was again declared in C. & O. R'y Co. v. McCabe, 213 U. S. 207, which was a contest between State and Federal courts as to jurisdiction over the subject-matter of the litigation. In the course of the opinion, it was said:

"The judgment under review was the only final judgment in the appellate court of the State from which the plaintiff in error could prosecute a writ of error, and until such final judgment the case could not have been brought here for review. *Schlosser* v. *Hemphill*, 198 U. S. 173, and cases therein cited."

These cases conclusively settle the proposition that the judgment of the Court of Appeals of Kentucky on the first appeal, which plaintiff is seeking to have reviewed here, was not a final judgment and is not reviewable by this Court. And her writ of error should be dismissed.

III.

But, even if the Court had jurisdiction to review on such writ of error the judgment of the Court of Appeals of Kentucky on the first appeal, the Court would not order such judgment reinstated, for the reason that it reversed a judgment which this Court would have reversed if the Kentucky court had affirmed it and defendant had brought it here on writ of error, for these reasons (in the order raised in plaintiff's writ of error):

a. The judgment of the Kentucky Court of Appeals, March 26, 1915, did not "render final its prior judgment of February 27, 1914." The latter judgment became final on February 27, 1914, and was in nowise affected by the judgment of March 26, 1915, and could not have been.

b. Said Court of Appeals did not err "in its final judgment of March 26, 1915, in not setting aside its said prior judgment of February 27, 1914, and in not reinstating said judgment of the trial court of April 11, 1912," for the conclusive reason that said Court of Appeals had no power or authority whatever, either on March 26, 1915, or at any time after February 27, 1914, to revise or reverse its judgment reversing the judgment of the lower court on the first trial. The Court had lost all jurisdic-

tion and control over the case so far as its said first judgment was concerned.

c. If the judgment which the Court of Appeals reversed on the first appeal was vitally erroneous in material respects, making a reversal necessary, it is wholly immaterial whether or not the trial court erred in requiring the jury to apportion the damages between the beneficiaries. If they were not entitled to that judgment at all, there is no question here as to how that void judgment should have been distributed between the beneficiaries if they had been entitled to collect it. The same is true as to plaintiff's fourth assignment of errors in Instructions No. 1 and No. 3 given on the first trial and condemned by the Court of Appeals.

d. Inasmuch as, on plaintiff's petition therefor, the Kentucky court reheard the case on the first appeal and corrected the measure of damage instruction to conform to the Federal Act instead of to the State practice, she has no ground of complaint as to her fourth assignment of error on that point. But the question is material to us: On the first trial the lower court gave the State rule —or tried to, but the Court of Appeals said it was not correct, even under State law—as to measuring damages. In the original opinion the rule was thus stated: "That sum that will compensate his estate for the destruction of his power to earn money"—a succinct statement of the Kentucky rule. But, on plaintiff's petition to rehear, the court took back that statement in its opinion, and referred to its opinion in the Dwyer case for the correct rule for measuring damages in actions brought under the Federal

Employers' Liability Act, which limits recovery to loss of pecuniary benefits of which the beneficiaries have been deprived by the death. (C. & O. R. Co. v. Dwyer's Admx., 157 Ky. 590.) Now, our point is that if there had been no other error in the first judgment of the Warren Circuit Court, it should have been reversed by the Court of Appeals because of the error in the measure of damage instruction, and, therefore, plaintiff was not deprived of any Federal right to which she was entitled by the action of the Court of Appeals in reversing a judgment secured under a measure of damage instruction which is condemned by every utterance of this Court on that subject. (M. C. R. Co. v. Vreeland, 227 U. S. 59; American R. Co. v. Didricksen, 227 U. S. 145; G. C. & St. F. R'y Co. v. McGinnis, 228 U. S. 173; St. L. & S. F. R'y Co. v. Seale, 229 U. S. 156; N. & W. R'y Co. v. Holbrook, 235 U. S. 625; Garrett v. L. & N. R. Co., 235 U. S. 308.

And, as touching the seeming reliance of counsel who drew plaintiff's writ of error, on defendant's lack of right to object, in the Court of Appeals, to erroneous instructions because defendant did not offer correct instructions in their stead, we call the court's attention to the language of the Court of Appeals in the Dwyer case, *supra,* which on a writ of error from the second judgment, of affirmance, is to be heard by this Court at the same time the case at bar is heard, where the Court answered a like objection as follows:

"It is insisted for appellee that, as appellant did not on the trial offer a correct instruction on the measure of damages, it is estopped to ask a reversal of the judgment

appealed from because of the giving of the incorrect instruction by the trial court on that subject. This contention must be overruled. It is true that an instruction on the measure of damages was not offered by appellant, but such failure did not relieve the trial court of the duty of correctly instructing the jury on that subject. Having attempted to give an instruction on that feature of the case, it was the duty of the court to state it in correct form. Its failure to do so was prejudicial to the rights of appellant, and, as it objected to the instruction as given, it is not estopped to insist upon a reversal of the judgment because of the error committed by the trial court in giving the instruction. L. & E. R'y Co. v. Crawford, 155 Ky. 723; South Cov. & C. St. R'y Co. v. Core, 29 R. 836."

The language on this point in the Crawford case was substantially the same as in the Dwyer case which we have quoted. In the Core case, also cited in the Dwyer case, the Kentucky court said:

"It is argued by counsel for appellee that as appellant's counsel did not ask an instruction on the measure of damages, it can not complain of the one given on that question, however erroneous the court may find it to be. We think this contention unsound. While Section 317, Subsection 5, Civil Code, only requires a trial judge to give instructions if asked by the parties, it has been held by this court that if, unasked, he undertakes to do so, it is his duty to see that the instructions given are correct. Furthermore, it has also been held that if an instruction

is offered by either party which is defective in form or substance, the court 'should prepare, or direct the preparation of, a proper instruction on this point.' (L. & N. R. Co. v. Harrod, 115 Ky. 877)."

And in L., H. & St. L. R'y Co. v. Roberts, 144 Ky. 820, the Court of Appeals of Kentucky held:

"It is said, however, by counsel for appellee that the appellant company can not complain of the failure of the trial court to properly instruct the jury on the subject of damages as it did not offer any instruction upon this point. The rule upon this subject has been announced in several cases, but as it appears not to be thoroughly understood by the profession, we will endeavor to restate it in simple form. (1) In civil actions the court is not obliged upon its own motion to instruct upon the whole law of the case, that is to say, if there are several issues in a case, upon all of which the parties would be entitled to have the jury instructed, and the court upon its own motion only instructs the jury as to some of the issues, the failure to instruct upon the other issues will not be available error, if the instructions given are correct, although proper exceptions may be saved to the instructions given. But if the instructions given are not correct, and proper exceptions are saved, the error may be taken advantage of upon appeal. (2) If the court undertakes upon its own motion or upon request of either of the parties to instruct the jury upon the law applicable to all the issues, or in other words to give the whole law of the case, then the court should properly instruct the

jury upon each issue that it undertakes to instruct concerning; and if an erroneous instruction is given that prejudices the substantial rights of the complaining party and proper exception is saved, it will be reversible error. (3) If instructions are offered upon any issue concerning which the jury should be instructed, but they are erroneous in form or substance, then the court should prepare or direct the preparation of a proper instruction in place of the defective ones. L. & N. R. Co. v. Harrod, 115 Ky. 877; South Covington & Cin. St. R'y Co. v. Core, 29 Ky. Law Rep. 836."

These cases are conclusive in our favor against plaintiff's proposition that we had no right to complain of the instructions which the Court of Appeals condemned on the first appeal, because we did not offer correct instructions in their stead. And this is not a Federal question, any way, but one of State practice, which this Court will not review.

e. As to Instruction 4, given on the first trial, respecting the duty of the jury to diminish the damages in proportion to decedent's contributory negligence, which plaintiff claims was correct, it is sufficient to say of it that it is the character of instruction which this Court condemned in N. & W. R'y Co. v. Earnest, 229 U. S. 114, and Seaboard Air Line R'y v. Tilghman, 237 U. S. 499, cited in our brief already filed in this Court in this cause.

f. In plaintiff's sixth assignment of error, touching the alleged error of the Court of Appeals, on the first appeal, in holding that Hill was not negligent, it is said "the evi-

dence showed that Hill was guilty of gross negligence in that he should have been near the switch staff instead of several hundred feet away, and that he had no duty elsewhere, and that there was no necessity to apply the emergency brake," etc. This statement is directly contrary to the language of defendant's Rule 117a, to which it refers (Printed Record, 73, 200). That rule says that "the employe attending the switch will, after locking it to the main track, take a position not *nearer* than 10 feet from the switch until the expected train has passed." Whereas, the assignment treats the rule as though it read "not *further away* than 10 feet." The rule fixes no distance from the switch the employe shall stand, except that he shall not stand *nearer* to it than 10 feet. He may stand as much further away from it as his good judgment and the other duties he has to perform may suggest and require. In this instance, it was proper for Hill to stand further away than 10 feet, because of the blocked crossings for which it was his duty to cut the train. And he was not standing "several hundred feet away," as the assignment asserts, but only about 100 feet away (Printed Record, 177).

Therefore, we submit that because of the fatal errors in the measure-of-damage and diminution-of-damage instructions given on the first trial of this cause, the judgment of the Court of Appeals of Kentucky could not have been other than it was. The judgment of the trial court was bound to be reversed for those errors. If it had not been, and we had brought the case here then, this Court

would have reversed the judgment for such errors, all other questions aside. So that, from whatever angle the proposition is viewed, there is no substantial or tenable ground for plaintiff to ask this Court to review the judgment of the Kentucky Court of Appeals reversing the first judgment of the trial court in this case, even if this Court had jurisdiction to review, which we have shown in the two previous divisions of this brief it has not.

On a well-settled principle, if the Court of Appeals reached the correct result in reversing the judgment on the first appeal, it is immaterial that it rested its decision on erroneous grounds instead of correct grounds. It is the result, and not the reasoning, that controls.

Hence, we respectfully ask this Honorable Court to quash the paper purporting to be defendant in error's cross-writ of error herein, with costs.

Respectfully submitted,

BENJAMIN D. WARFIELD,
Counsel for Louisville & Nashville Railroad Company.

JAMES C. SIMS,
JOHN B. RODES,
Of Counsel.

NOTE—In view of the fact that plaintiff's writ of error was not applied for or allowed until a few days before this case is likely to be reached for argument, we have been compelled to prepare and print this brief hurriedly, and without having seen any brief for plaintiff in this case at all.

FILED
APR 13 1916
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 485.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - Plaintiff in Error,

versus

JEANETTE STEWART, as Administratrix of the Estate of WILLIAM H. STEWART, Deceased, - - - - - - - Defendant in Error.

No. 904.

JEANETTE STEWART, as Administratrix of the Estate of WILLIAM H. STEWART, Deceased, - - - - - - - Plaintiff in Error,

versus

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - Defendant in Error.

In Error to the Court of Appeals of the State of Kentucky.

Reply Brief for the Louisville & Nashville Railroad Company.

BENJAMIN D. WARFIELD,
Counsel for Louisville & Nashville Railroad Company.

JAMES C. SIMS,
JOHN B. RODES,
Of Counsel,

April 12, 1916.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 485.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Plaintiff in Error,

versus

JEANETTE STEWART, AS ADMINISTRATRIX OF THE ESTATE OF WILLIAM H. STEWART, DECEASED,
Defendant in Error.

No. 904.

JEANETTE STEWART, AS ADMINISTRATRIX OF THE ESTATE OF WILLIAM H. STEWART, DECEASED,
Plaintiff in Error,

versus

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Defendant in Error.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

Reply Brief for the Louisville & Nashville Railroad Company.

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1. Learned counsel for plaintiff, who prepared her assignment of errors and brief in this court, is evidently unacquainted with the practice in the courts of Kentucky

under the Code of that State; and overlooks the fact that questions arising under such practice are not of a Federal character, but are merely matters of procedure, and whatever satisfies the requirements of the courts of the State in that behalf is not to be challenged elsewhere.

As the court said in Central Vermont R'y Co. v. White, 238 U. S. 507 (relied on by plaintiff on another point), in condemning multifarious assignments of error:

"Some of the assignments in the present case relate to matters of pleading; others to the admissibility of evidence, *to the sufficiency of exceptions*, and to various rulings of the trial court which involve no construction of the Employers' Liability Act and which, therefore, *can not be considered on writ of error from a State Court.* Seaboard Air Line v. Duvall, 225 U. S. 477, 486." (Our italics.)

This sufficiently disposes of the contentions made in plaintiff's brief as to the instructions having been given voluntarily by the trial judge; as to defendant's not having offered correct instructions in lieu of those which it complains were erroneous; that its exceptions to instructions given did not specify the particulars in which the instructions were erroneous; and as to the effect of the filing of defendant's amended answer to conform to the proof. As to these matters, the case was tried in conformity to the Code and practice of Kentucky, in a way to satisfy its Court of Appeals, because it considered and passed on the questions to which the exceptions related;

and being of a non-Federal character, this court will not review these questions.

That defendant's exceptions satisfied the requirements of the Kentucky practice, see L. & N. R. Co. v. McCoy, 81 Ky. 403; Meaux v. Meaux, etc., *Ib.* 475; Helfrich Saw & Planing Mill Co. v. Everly, 17 Ky. Law Reporter, 795; American Ins. Co. of N. Y. v. Austin, by, etc., 18 Ky. Law Reporter, 632; also, L., H. & St. L. R'y Co. v. Roberts, 144 Ky. 820, and cases there cited, quoted from on pages 13 to 15, inclusive, of our brief in support of motion to quash cross-writ of error.

The question presented in Illinois Central R. Co. v. Skaggs, 240 U. S. 60, on which plaintiff relies, was different from the one she argues with respect to instructions given in this case. In the Skaggs case, the question was as to the duty of the court to make the instructions more specific in the absence of request by either party to do so. Whereas, the question here is, as to whether a party has a right to complain of an erroneous instruction, given on motion of the other side or of the court, without offering a correct instruction in its place. The Roberts case, *supra,* settles this question against plaintiff.

2. Plaintiff's brief is clearly in error in asserting, in effect, that the Court of Appeals of Kentucky reversed the first judgment solely on the ground that the instructions were erroneous, and not also on the ground that the jury should have been peremptorily instructed to find for defendant for lack of evidence that it was negligent. In making this argument, plaintiff's counsel confuses two distinct things. The trial court submitted the case to the

jury specifically as to flagman Hill, but not as to conductor Jones. The court held that defendant was entitled to a peremptory instruction as to Hill, but that there was evidence which would have justified the submission of the case to the jury as to Jones. This does not mean that the court would have affirmed the judgment except for the errors in the instructions pointed out in the opinion. For, to have done so, the court clearly would have usurped the functions of a jury. It was not for the court to say, as matter of law, that defendant was liable because Jones was negligent. This was a question for a jury to decide, but which a jury had not then decided. The court made this clear in the response to the petition for modification of opinion (R., 109). Manifestly, unless, as we contend, there was no evidence that defendant was negligent to justify the submission of the case to a jury at all, both parties were entitled to have the jury pass on the question as to whether or not Jones was negligent. Therefore, the reversal of the judgment on the first appeal had a larger scope than plaintiff's counsel attribute to it. Under the Federal law (Employers' Liability Act, Sec. 3; Slocum case, *infra*) and under the law of Kentucky, if the case was to go to the jury at all, defendant was entitled to have all of the issues of fact submitted to the jury—was entitled to have the question as to whether or not Jones' negligence was the proximate cause of Stewart's injury submitted to the jury:

"The fact that appellants were given a jury trial of the most material parts of their case does not satisfy the

law which guarantees the right of trial by jury. That right is not alone that twelve laymen may pass upon some question of fact, even a vital one to the case, but that all the issues of fact—in this State the whole case, upon the law given them by the court—shall be so tried." (John King Co. v. L. & N. R. R. Co., 131 Ky. 46, 53, 114 S. W. 308.)

3. Plaintiff argues that the Kentucky Court erred in condemning the contributory negligence instruction given on the first trial, because, as is claimed, there was no evidence that Stewart was contributorily negligent, and, therefore, no instruction on contributory negligence should have been given. We think this contention is unsound. It is true, direct evidence as to what Stewart was doing at the time it is claimed he was injured, and whether or not his conduct on that occasion made him contributorily negligent, is meager. But it is not essential that there should have been direct evidence in order to raise an issue of fact for the jury on this point.

In Watkins v. City of Henderson, 168 Ky. 622, decided February 22, 1916, a case where a pedestrian was injured by a defective street, and where the trial court gave a contributory negligence instruction, and the jury found for the city, it was argued on behalf of Watkins, on his appeal, that no contributory negligence instruction should have been given for the reason that there was no evidence on which to predicate the instruction. That was the only error relied on. In rejecting this contention, the court said:

"It is of course elementary that instructions must be supported by evidence. But this does not mean that direct evidence is essential or that negligence may not be inferred from circumstances developed in the trial of the case, although there may not be any fact directly imputing it. And the jury who heard the witnesses describe the locality where the accident happened, as well as the manner in which it occurred, might have concluded that if Watkins had been exercising ordinary care for his own safety he would not have stumbled and fallen. There might of course be a case presenting facts somewhat similar to this in which an instruction on the subject of contributory negligence would be out of place, but, generally speaking, an instruction on contributory negligence in this class of cases may be rested on circumstances shown by and reasonable inferences to be drawn from the evidence, and we can not say that it was error to give such an instruction in this case."

(See page 38 of our original brief.)

The fact that Stewart assumed a position on the engine whereby he was injured by a jerk which did not injure fireman Sorrells, was a circumstance from which the jury had a right to infer that Stewart was contributorily negligent.

4. In the brief on the other side, as to what happened to fireman Sorrells when the train was angle-cocked and it is claimed Stewart was injured, it is said:

"The force of the jerk or jar was so great that the fireman was thrown from his seat on the left-hand side of the engine up against the boiler." (Page 4.)

This statement does not agree with what Sorrells himself testified. He said, on the first trial (R., 38): "I was standing just inside of the cab ringing the bell, and it overbalanced me and I fell up against the tank." And, on the second trial, he testified (R., 164): "I was standing on the deck and I got overbalanced and caught against the tank." There is a wide difference between a fireman who is sitting on his seat in an engine cab being thown therefrom by a jerk, and his being jostled against the boiler while he is standing near it in the deck of the engine, ringing the engine bell.

5. While it seems to be true, as stated by opposing counsel, that the motion and grounds for a new trial on the first trial (R., 18) did not expressly include instruction No. 4, yet the bill of exceptions (R., 26, 27), which is controlling, does show that the defendant and plaintiff both excepted to the giving of all of the seven instructions which the court gave on its own motion, including instruction No. 4. Therefore, the argument now attempted to be made that the Court of Appeals of Kentucky had no right to consider the question of contributory negligence, because instruction No. 4 was not specifically named in the motion and grounds, is captious and untenable. Furthermore, this is not a Federal question, as we have already shown.

6. It is admitted by plaintiff that the measure of damage instruction given on the first trial, which was

condemned in the opinion of the Court of Appeals on the first appeal (R., 108-109), was not a correct instruction under the Federal Act, as held by this court in the Vreeland, Didricksen, McGinnis and other cases. It was not even a correct instruction under Kentucky law, as the Court of Appeals pointed out in its original opinion (R., 108). But, it is said for the administratrix, in substance and effect, that while the instruction was improper in authorizing the jury to award damages in "such a sum as will fairly compensate his estate for his death," instead of authorizing the jury to award such damages as the evidence showed the beneficiaries to have been deprived of by reason of Stewart's death, nevertheless, the instruction was not prejudicial to defendant, for the reason that the infant children were entitled to recover for the loss of care, counsel, training and education of the deceased parent, which could not be recovered for under the State law, and that in some unexplained way the court should have assumed that a recovery under the Act, thus augmented, would about equal, if it would not exceed, the amount recoverable under the State law for the benefit of decedent's estate, and that, therefore, defendant was not prejudiced, because the measure of damage instruction was attempted to be given according to State law, rather than according to the Federal Act. This argument overlooks the fact that it is the duty of the jury to fix the damages under proper instructions, and that the court can not say that the jury's verdict would have been the same if a correct measure of damage instruction had been given, instead of one that was incorrect.

In Covington Saw Mill & Mfg. Co. v. Drexilius, etc., 120 Ky. 493, it was argued that although an instruction authorizing punitive damages in addition to compensatory damages was erroneous it was not prejudicial for the reason that the verdict was no more than could properly be sustained as compensation. But the court rejected this view, saying:

"While we might be of opinion that the verdict was no more than would compensate one for the pain endured, and the impairment of his capacity for laboring and earning money, as the result of such an injury, manifestly to do so would be to usurp in a measure the province of the jury in this respect. They may have thought otherwise, and the appellant is entitled to their verdict, and not to our judgment instead, upon this subject. If the jury should have found that a less sum was fair compensation, it would not have been within our province to have increased it. * * * At any rate appellant was entitled to have his real case tried by the jury under unobjectionable instructions as to the measure of damages."

If the argument of plaintiff on this proposition were sound, a judgment would never be reversed because of an erroneous measure of damage instruction, with the result that courts would be fixing the amount of the damages, instead of juries who are the constitutional triers of such questions. (Slocum v. N. Y. L. I. Co., 228 U. S. 364; Sec. 3, Employers Liability Act.) And it is not as though the instruction on the measure of damages on the first trial had been correct under the State law. It

was not correct either under that law or under the Federal law. And inasmuch as an incorrect instruction, as has been uniformly held, is worse than no instruction at all, it is just as though there had been no instruction given the jury on the measure of damages on the first trial of the case, the judgment on which the administratrix is asking this court to reinstate, and the jury had been left unguided by law in arriving at their verdict. If the only obstacle that stood in the way of plaintiff's right to have the first judgment reinstated was the error in the measure of damage instruction given the jury on that trial, for that error alone, we respectfully submit, plaintiff's request would have to be denied.

7. The case of Campbell v. Northwest Eckington Improvement Company, 229 U. S. 561, and the eight other cases cited in connection therewith by counsel on the other side, in an attempt to induce this court to reinstate the first verdict for $20,000, do not support the right or duty of this court to do that which the other side ask be done. Most of the cases so cited were equity cases, consisting of attachment, apportionment warrant, railroad bond issue, divorce and alimony, and other like causes, and, therefore, the judgments were rendered by the courts without juries. The right of an Appellate Court as to such cases to render judgment or to direct the judgment that should be rendered is, of course, well settled. The only personal injury cases tried to juries cited in the list are Perkins v. N. P. R'y Co., 199 Federal, 712, and Muse v. Stern, 82 Va. 33. The Perkins case is very different from this one. In the first place, that case was brought and

tried in a Federal Court and the opinion cited is that of the Circuit Court of Appeals, which reversed the judgment of the District Court. That court submitted the case to a jury, who returned a verdict in favor of plaintiff. On motion of defendant, the court entered a judgment in its favor *non obstante veredicto*, upon the view that the evidence was insufficient to support the verdict finding defendant negligent. The Circuit Court of Appeals, taking a contrary view, reversed the action of the trial court and directed it to enter judgment on the verdict of the jury in favor of plaintiff. That is a very different thing from reinstating a judgment which has been reversed by an Appellate Court, because, among other grounds, the case was submitted to the jury on a false issue on the first trial, and where, on the second trial, the jury found another verdict in favor of plaintiff, as is the case here.

In the Muse case the question was as to the liability of the owner of a phaeton to a pedestrian on the street, who was struck by the phaeton while it was driven by an employe of the owner. On the first trial there was a verdict for the plaintiff, which the trial court set aside. On the second trial there was a verdict for the defendant, the owner of the vehicle, which the trial court refused to set aside. On appeal, the injured person sought to have the first verdict that was set aside reinstated. But the Supreme Court of Appeals of Virginia refused to reinstate the first verdict, and held that plaintiff was not entitled to recover. Hence, the Muse case is entirely inapplicable here.

8. Another point attempted to be made in plaintiff's brief is that the petition for writ of error (R., 222) refers "to an alleged judgment of the Court of Appeals of April 29, 1915, as the final judgment by which it is aggrieved. No judgment of that date appears in the record." The recital in said petition was made for the reason that under Section 760, Civil Code, Kentucky, either party to an action has thirty (30) juridical days after the opinion is delivered in which to file a petition for rehearing, and the judgment does not become final until the expiration of such thirty (30) days. In the case at bar no petition for rehearing or for modification of opinion was filed, and the opinion became final April 29, 1915, as the petition for writ of error recites, and as the Chief Justice of Kentucky attests.

9. In discussing, in our original brief, the second and third assignment of errors, that the evidence was insufficient to justify the submission of the case to the jury, we briefly referred to the proposition of law that a person is only responsible for the consequences which may reasonably be expected to flow from his acts, and that such a consequence as happened to Stewart could not reasonably have been expected to flow from the act of Jones in signalling the train back, or of Hill in applying the angle-cock (Brief, p. 38). We did not cite any authority on the proposition. Upon further reflection we conclude it is probably advisable to amplify our argument on this point by the citation of authority for the convenience of the court.

In 21 Am. & Eng. Encyc. of Law, page 486, under the subheading "RULE OF CONTEMPLATION OF CONSEQUENCES," it is said:

"In the writer's view, the entire subject of negligence depends upon the question of contemplation of consequences, properly stated and applied. Loosely speaking, the rule on this subject may be stated to be that a defendant is not liable in negligence where no injurious consequences could reasonably have been contemplated as a result of the act or omission complained of, but is liable where injuries might have been anticipated or foreseen."

And in M. & St. P. R'y Co. v. Kellogg, 94 U. S. 469, the question was as to whether the railway company, which had negligently set fire to one building, was liable for the destruction of another building to which the fire was communicated from the first building. The court said:

"It is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was a natural and probable consequence of the negligence, or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

See, also, Scheffer v. R'y Co., 105 U. S. 249.

In C., St. P., M. & O. R'y Co. v. Elliott, 55 Fed. 949, the court quoted approvingly from Hoag v. Rd. Co., 85 Pa. St. 293:

"The true rule is that the injury must be the natural and probable consequence of the negligence—such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer, as likely to flow from the act."

And again:

"A probable consequence is one that is more likely to follow its supposed cause than it is to fail to follow it."

And again:

"The natural consequence of an act is the consequence which ordinarily follows from it—the result which may reasonably be anticipated from it."

In Motey v. Pickle Marble & Granite Co., 74 Fed. 155, it was said:

"An injury that is the natural and probable consequence of acts of negligence is actionable, but an injury that could not have been foreseen or reasonably anticipated as the probable result of the negligence is not actionable."

And again, in Addison on Torts, Section 6:

"If the wrong and the resulting damage are not known by common experience to be naturally and usually in sequence, and the damage does not, according to the usual course of events, follow from the wrong, then the wrong and the damage are not sufficiently conjoined or concatenated as cause and effect to support an action,"

quoted approvingly in Gilson v. D. & H. Canal Co., 36 Am. St. Rep. 802, 809.

Such is also the Kentucky rule. W. G. Gosney v. L. & N. R. Co., 168 Ky. 323 (March 22, 1916), and cases there cited, including several of those hereinabove cited.

We respectfully submit that under the "RULE OF CONTEMPLATION OF CONSEQUENCES," as affecting proximate cause, Hill could not reasonably have contemplated that Stewart would be injured in the way it is claimed he was injured, as a result of Hill's angle-cocking the train; nor could Jones, as a result of his signalling the train back.

10. Under the heading, "*Crucial Error—Apportionment of Verdict,*" plaintiff argues her third assignment of error to the effect that the Court of Appeals of Kentucky erred in holding that on another trial the lower court should give the jury a measure of damage instruction requiring them to apportion the damages among the beneficiaries, instead of finding a verdict *in solido.* We do not see how this argument helps plaintiff, for at least two reasons: (a) The verdict, the judgment on which she asks to have reinstated, was not rendered under an instruction given under the Federal Act at all; but under an instruction attempted to be given under the State law, and which was not correct, even under such law. (b) It seems to us it is a misconstruction of Central Vermont R'y Co. v. White, 238 U. S. 507, 513, to argue that it is error for a trial court to instruct the jury in an action under the Federal Act to apportion the damages among the beneficiaries. What was decided in the White case,

as we read it, is that a verdict *in solido* is not erroneous where the complaining party has not asked that the jury be instructed to apportion the damages. We find nothing in the opinion justifying the claim plaintiff makes for it here, that it is error for the trial court to instruct the jury to apportion the damages. On the contrary, it seems to us that the White case holds that under the Federal Act there may be a valid verdict, either *in solido* or by apportionment, and that it is for the parties to the litigation, by timely requests, to have the court control this question in submitting the case to the jury. Furthermore, plaintiff not having embraced in the instructions she asked the court to give the jury on the last trial (R., 121, 122), an instruction requiring the jury to render a verdict *in solido,* instead of by apportionment, is precluded now, under the White case, from complaining of the action of the court in requiring the jury to apportion the verdict, even though if plaintiff had timely requested that the jury be instructed to find a verdict *in solido,* the apportioned verdict would have been erroneous.

11. On page 6 of plaintiff's brief complaint is made that defendant was permitted to file an amended answer before the second trial was begun, averring that Stewart left the administratrix $5,000 of life insurance, and that defendant was permitted to interrogate the administratrix on the witness stand on this subject. There are two answers to this complaint: (1) As affecting the pecuniary necessities of the administratrix and her children, it was competent to show what estate Stewart left them. (2) But, if otherwise, the error, if any, was not prejudi-

cial to plaintiff, for the reason that the court in its instructions did not authorize the jury to take Stewart's life insurance into consideration in arriving at their verdict, but expressly refused to do so by rejecting Instruction "D," offered by defendant (R., 121). Section 338, Kentucky Civil Code of Practice, provides: "No exception shall be regarded, unless the decision to which it relates be prejudicial to the substantial rights of the party excepting." See also Sections 134, 756, same Code; L. & N. R. Co. v. Stiles, etc., 133 Ky. 786; Slaughter v. Ditto, 108 S. W. 882.

12. Counsel for plaintiff are in error in attempting to state our position as to plaintiff's cross-writ of error. We do not claim that plaintiff should have prayed a writ of error from the judgment of the Court of Appeals of Kentucky, which became final February 27, 1914, within two years from that date. We say she has no right to prosecute a writ of error from that judgment at all, because that was not a final judgment such as this court will review.

This brief relates only to the first 33 pages, styled Part I, of the brief for the administratrix, which is the only portion of his argument with which opposing counsel has favored us down to this time. This fact will explain to the court why we make no reference to anything stated in Part II of said brief.

We respectfully ask that the cross-writ of error be quashed; or, if the court shall entertain said cause, that plaintiff's prayer that the judgment on the first appeal to the Court of Appeals of Kentucky be reinstated be de-

nied. And, on the original writ of error, we respectfully ask that the judgment of the Court of Appeals of Kentucky, on the second appeal, which affirmed the judgment of the Warren Circuit Court on the second trial, be reversed, annulled and held for naught.

Respectfully submitted,

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Of Counsel.

April 12, 1916.

FILED
APR 18 1916
JAMES D. MAHER
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 485.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

JEANETTE STEWART, ADMINISTRATRIX OF THE ESTATE OF WILLIAM H. STEWART, DECEASED, DEFENDANT IN ERROR.

No. 904.

JEANETTE STEWART, ADMINISTRATRIX OF THE ESTATE OF WILLIAM H. STEWART, DECEASED, PLAINTIFF IN ERROR,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF KENTUCKY.

BRIEF FOR ADMINISTRATRIX.

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BRIEF FOR ADMINISTRATRIX.

The action arose under the Employers' Liability Act of 1908. On motion of the Railroad Company No. 485 has been advanced with certain other cases for hearing with No. 321 of this term on the theory that there is involved for

construction in each of these cases, as an important question, the alleged application of the Seventh Amendment of the Federal Constitution to jury trials in State courts of cases arising under this Federal statute.

By a reference to separate joint brief of counsel for defendants in error in all of these cases the court will find a discussion of the subject as actually applied to some of the cases.

This is one of the cases, however, in which it will be contended that *the disposition by this court of the main question of constitutional law is entirely immaterial so far as the above-entitled writ of error and cross-writ of error are concerned. Both trials were by juries of twelve men and both verdicts were unanimous verdicts.*

The action was filed in the Circuit Court for Warren County, Kentucky, on July 30, 1910, resulting in a judgment at the first trial of April 11, 1912, for $20,000 and costs in favor of the Administratrix of the deceased employee, the same being based upon a verdict *in solido* (R., 17). On appeal by the Railroad Company this judgment was reversed (R., 110) by the judgment of the Court of Appeals of February 27, 1914, remanding the cause for new trial and for further proceedings consistent with its opinion of December 19, 1913 (R., 104-109), and modified opinion (R., 109) of February 27, 1914. Such retrial resulted in another verdict, apportioning the damages among the beneficiaries, on which judgment was rendered May 28, 1914, for $11,885, with costs. This judgment, on appeal, was affirmed by the Court of Appeals by its final judgment of March 26, 1915 (R., 218), with costs and ten per cent damages.

The plaintiff in error in No. 485 apparently seeks to have reversed the judgment rendered at the second trial, although it refers in its petition for writ of error (R., 222) to an alleged judgment of the Court of Appeals of *April 29*,

1915, as the final judgment by which it is aggrieved. *No judgment of that date appears in the record.*

The defendant in error in No. 485, as cross-plaintiff in error in No. 904, seeks to have reinstated the judgment for $20,000 rendered at the first trial. Agreeably to the decisions of this court in C. & O. *vs.* McCabe, 213 U. S., 207, 214, and Louisiana Navigation Company *vs.* Oyster Commission, 226 U. S., 99, 102, she sued out her cross-writ of error within an appropriate time after, and with special reference to, the final judgment of March 26, 1915.

The writ of error in No. 485 was allowed April 30, 1915 (R., 223), and it was docketed in this court June 1, 1915; but the record was not printed until about February 23, after the motion of the plaintiff in error to advance was allowed February 21, 1916. Prior to that time no assignments of error or petition for a cross-writ of error had been filed by the Administratrix in the State court; but counsel resident in Washington had been employed and had appeared for her as defendant in error in 485, the record in which had been prepared in form to be used as the principal foundation for such cross-writ of error. As soon as the record was printed in No. 485, and *in less than one year from the date of final judgment* of the Court of Appeals of Kentucky, to wit, on March 11, 1916, the Administratrix filed her assignments of error and petition for cross-writ of error in the court below. The petition being allowed by the chief justice of that court, she, on the same day, gave bond and otherwise complied with the necessary preliminaries to the docketing of said cross-writ of error in this court. It was so docketed as case No. 904 on March 18, 1916, and, on the same day, the "Transcript of Record of Cross-writ of Error" was ordered printed.

The principal part of the record in the two cases being embraced in the record of No. 485, the letter "R." as used herein will apply to that record and "Transcript in No. 904" will apply to the short record bearing the last number.

For convenience the original plaintiff in the action will hereafter be referred to as the Administratrix and the original defendant in the action as the Railroad Company or the Company.

Statement.

The action was brought within the statutory period under the Federal Employers' Liability Act of 1908 by the Administratrix of William H. Stewart on her own behalf as widow and on behalf of the three minor children of her intestate, the eldest of whom was less than six years of age at the time of the death of the decedent, on September 27, 1908. The action is for the pecuniary loss suffered by these dependents by reason of the death of the decedent, as the result of an injury sustained by him on September 7, 1908, while serving in the line of duty as an employee of the Railroad Company and actually engaged in interstate traffic and commerce, being employed as an engineer on a freight train running between Bowling Green, Kentucky, and Paris, Tennessee. Decedent was a resident of Bowling Green, situated in the county in which the action was brought, and the Railroad Company was operating under a charter from the State of Kentucky, with a place of business in said county.

The injury was caused by the sudden jar or jerk resulting from the unexpected, unusual, and unnecessary application by the rear brakeman of the air brakes by the use of an emergency lever at the rear end of the train while the train was being backed on the siding at Cumberland, Tennessee, and while the decedent was leaning out of the window and moving the train under signals being received from the conductor.

The force of the jerk or jar was so great that the fireman was thrown from his seat on the left-hand side of the engine up against the boiler, and the head and right shoulder of decedent were severely injured by being thrown

against the engine at the right-hand window thereof, resulting later in his death.

Upon the conclusion of the evidence at the first trial the Company practically abandoned its plea of contributory negligence in diminution of damages, and tendered for leave of court to file (*"to conform to the proof"*) its amended answer (R., 27-28), asserting as a defense the assumption of risk, and in which proposed amended answer it was affirmatively averred (R., 28) "that said Stewart's alleged injury * * * *was the result of the jerking and jarring of the train under the circumstances as above set out,"* etc., said circumstances, as alleged and set out, including the use of the air brakes as the cause, but in no way involving the idea of contributory negligence on the part of decedent.

The Administratrix had to rely for the proof of the facts and circumstances immediately attending the injury upon the testimony of members of the train crew, all remaining in the employment of the Railroad Company, and some of whom were personally interested in relieving themselves, as far as possible, of the odium of culpability.

The indisputable physical facts and the printed rules of the Company were such, however, as to make it practicable, even with such hostile witnesses, for a state of facts to be presented before the jury at each of the two trials, on which liability of the Railroad Company was found *by the unanimous verdict of twelve jurors.*

At each trial, also, the judge who heard the evidence refused to sustain the demurrer to the evidence, and after the verdict of each trial the court overruled the motion of the Railroad Company for a new trial.

On both appeals the Court of Appeals of Kentucky sustained the action of the trial court in refusing to take the case from the jury, and also expressly found that there was evidence on which the jury might properly have found negligence on the part of the Company or its agents. The Court of Appeals did find, however, in its decisions on the

first appeal that there was reversible error, specifying certain Federal questions (including the erroneous idea that the verdict should have apportioned the damages among the beneficiaries), as will more fully appear by the assignments of error of the Administratrix below.

The instructions given by the Court of Appeals in connection with the retrial were such that the court erroneously required that there should be an apportionment among the beneficiaries of the full amount of the verdict, and there was also practically excluded from the consideration of the jury, in the assessment of damages, the amount of damages for the pecuniary costs of providing for these children the care, counsel, training and education which they might have reasonably received from their deceased father.

At the second trial the court otherwise pursued a course highly prejudicial to the interests of the beneficiaries, including the grant of leave to the Company to file an amended answer(R., 111), averring the payment on the life of decedent of insurance amounting to $5,000; also in permitting the Railroad Company at the second trial (R., 134 *et seq.*) to introduce testimony showing the collection by the widow of something over $5,000 insurance on the life of decedent, no part of which was contributed to or paid by the Railroad Company.

In view of such palpable error, naturally the amount of the verdict and judgment on the second trial was materially reduced; yet, not satisfied, the Company appealed to the Court of Appeals, with the result that the same was affirmed with costs and 10 per cent damages.

The alleged errors assigned on behalf of the Company in support of its writ of error in No. 485 will be referred to more in detail in the argument.

Since the suing out of the cross-writ of error there has been served on counsel for the Administratrix what is termed a "Motion to Quash Cross-writ of Error."

Assignments of Error.

The errors upon which the administratrix, as plaintiff in cross-writ of errors, relies for a reversal of so much of judgment of the Court of Appeals of Kentucky of March 26, 1915, as renders final its prior judgment of reversal of February 27, 1914, and for the reinstatement of her judgment rendered at the first trial, as shown by her assignment of errors (Printed Cross-Writ, Record, 904, pp. 2-4) are as follows:

> "First. That said Court of Appeals of Kentucky erred in its judgment of March 26, 1915, in so far as the same rendered final its prior judgment of February 27, 1914, reversing the judgment of the trial court of April 11, 1912, in favor of this plaintiff in error for $20,000.00 and costs and remanded the cause for a new trial and for further proceedings consistent with the opinion of December 19, 1913, and the modified opinion of February 27, 1914, of said Court of Appeals of Kentucky.
>
> "Second. That said Court of Appeals of Kentucky erred in its final judgment of March 26, 1915, in not setting aside its said prior judgment of February 27, 1914, and in not reinstating said judgment of the trial court of April 11, 1912, for $20,000.00 and costs.
>
> "Third. That the Court of Appeals of Kentucky, in reversing said judgment for this plaintiff in error for $20,000.00 based upon the verdict of a jury rendered without the defendant in said action asking the trial court to instruct the jury to apportion the damages, erred in proceeding upon the hypothesis that such apportionment was essential to a valid judgment under said act of Congress and that it was the duty of the trial court to instruct the jury to apportion the recovery between the beneficiaries; whereas said act of Congress has been construed directly to the contrary by the Supreme Court of the United States in a similar case, Central Vermont Railway

Company *vs.* White's Administratrix, decided June 21, 1915.

"Fourth. That said Court of Appeals of Kentucky, in reversing said judgment for $20,000.00 and costs, erred in holding that instructions numbered 1 and 3, as voluntarily given by the trial court, were erroneous because the same 'might authorize the jury to consider mental anguish, and loss of companionship and so on,' to wit:

" 'Instruction No. 1. The court instructs the jury that if they believe from the evidence that on the occasion in controversy that the defendant's agents and employees in charge of its train, or any of them, did with negligence, operate and manage the train upon which plaintiff's intestate, W. H. Stewart, was serving as engineer, so as to cause him to fall against the cab of the engine and injure him, and that he died as the natural and proximate result of said negligence, if any, they shall find for plaintiff such a sum as will fairly compensate his estate for his death if it occurred wholly or in part from the negligence, if any, of the servants or agents of defendant as aforesaid, not to exceed the amount sued for, to wit: $35,000.

* * * * * * *

" 'Instruction No. 3. The court further instructs the jury that in estimating the damages aforesaid, if any, they may take into consideration the capacity of said Stewart to earn money the probable duration of life, his habits or industry, and sobriety and his skill in business in which he was engaged, but his habits of industry and sobriety are not to be considered by them except for the purpose of showing his power to earn money.'

"And said court further erred in its said opinion of December 19, 1915, in commenting upon said instructions as follows:

" 'The correct measure of damages in such cases has been so often pointed out by this court that it would seem unnecessary to cite authority; but in this case in the first instruction the plaintiff is permitted to recover such a sum as will fairly compensate his

estate for his death. Instructions similar to that have been frequently condemned upon the idea that it might authorize the jury to consider mental anguish, loss of companionship and so on. The true measure of damages is that sum that will compensate his estate for the destruction of his power to earn money. * * * Instruction No. 3 is erroneous for the same reason as instructions No. 1; it should have been in substance that the measure of recovery is such sum as will compensate his estate for the destruction of his power to earn money, and that the jury may, in arriving at this amount, consider all the evidence in the case bearing upon this question.'

"Whereas the defendant in said trial court utterly failed to exercise its opportunity to point out any alleged error in said instruction or to submit proposed instructions upon that phase of the case; the said voluntary instructions of the trial court numbered 1 and 3 were not prejudicial to the defendant, but as given were more favorable to the defendant than to the plaintiff; taken together, they affirmatively convey the idea of financial support for the defendants, as contradistinguished from other forms of damages; and said instructions do not even suggest, what the Court of Appeals in its said opinion practically excludes, the right to have the jury find in damages the loss to each child 'of that care, counsel, training and education which it might, under the evidence, have reasonably received from the parent, and which can only be supplied by the services of another for compensation'; and

"Whereas said Court of Appeals of Kentucky itself, in its subsequent opinion of February 27, 1914, in 'Response to Petition for Modification and Rehearing,' said:

" 'Overlooking for the instant that this case was tried under the Federal Employers' Liability Act, and by reason of the haste and confusion incident to the closing day of a term of this court, the Kentucky rule as to the measure of damages was incorrectly directed to be given on another trial instead of the measure of damages prescribed by the Federal statute.

" 'Upon a new trial the measure of damages will be

given under the Federal statute as construed by the Supreme Court of the United States, all of which is carefully gone into and pointed out in the case of C. & O. R'y *vs.* Dwyer's Adm'x, 157 Ky., 590.

" 'To the extent indicated the opinion is modified.'

"Fifth. That the said Court of Appeals of Kentucky in reversing said judgment for $20,000.00 and costs erred in holding that instruction No. 4, as voluntarily given by the trial court, was erroneous, to-wit:

" 'Instructions No. 4. The court instructs the jury that in the operation of defendant's train it was the duty of the plaintiff's intestate as engineer to exercise ordinary care for his own safety and if he failed to exercise such care and his own negligence contributed in any way to produce the injuries, if any, complained of in the petition. then to the amount of such negligence, if any, attributable to said Stewart, the jury shall diminish the damages, if any, which may be found by them, if any at all, under these instructions.'

"Whereas the defendant in said trial court utterly failed to exercise its opportunity to point out any alleged error in said instruction or to submit to said trial court any proposed instruction upon that phase of the case; and, although said instruction was conformable to the Federal statute and could not be prejudicial to the defendant in said action, yet, by reason of the lack of evidence of negligence on the part of decedent, the voluntary submission by the court of an instruction suggesting possible negligence on his part necessarily tended, if anything, toward the prejudice of the plaintiff in said action, this plaintiff in error, and not to the prejudice of the defendant in said action.

"Sixth. That said Court of Appeals of Kentucky especially erred in finding in its opinion that Hill, the flagman, was not negligent under the proof in applying the emergency brake and that he did the only thing which he could reasonably have done, and holding that in another trial of the case the second

instruction which deals alone with the negligence of Hill should be eliminated if the evidence is the same, for the reason that the evidence showed that Hill was guilty of gross negligence in that he should have been near the switch staff instead of several hundred feet away, and that he had no duty elsewhere, and that there was no necessity to apply the emergency brake, and that instruction No. 2 was properly given. Said instruction is as follows:

" 'Instruction No. 2. The court instructs the jury that under the rules of defendant's company, it was the duty of the flagman, O. L. Hill, to apply the emergency air brake by the use of the angle-cock on the rear of the train, only when necessary to avoid injury to life or property; and if they believe from the evidence that at the time said Hill applied said emergency air brake it was not necessary nor believed by the flagman to be necessary in the exercise of a reasonable judgment in the prudent and careful operation of the train, to apply said emergency air brake to avoid injury to life or property, and shall further believe from the evidence that plaintiff's intestate received the injury which resulted in his death as the direct and proximate result of the application of said emergency air brake, then they should find for plaintiff.'

"Seventh. That said Court of Appeals of Kentucky, in reversing said judgment for $20,000 and costs, erred in holding that there was any reversible error in the trial court at the first trial in which said judgment for $20,000 and costs was rendered."

ARGUMENT.

The argument will be divided into two parts, namely:

Part I will be in support of the cross-writ of error sued out by the Administratrix in case No. 904, and

Part II will constitute a response to brief of the Railroad Company, as plaintiff in error, in case No. 485.

PART I.

Cross-writ of Error.

I.

Jurisdiction.

As preliminary to a more detailed presentation of the questions involved in the assignments of error it is deemed appropriate under this head to discuss the matter of the jurisdiction of the trial court, including a brief reference to the untenable suggestion that said court was without jurisdiction, by reason of the Seventh Amendment to the Federal Constitution, and under the head of jurisdiction of this court it is proposed to show that the cross-writ of error was not only appropriately taken, but also that it is within "the power and duty" of this court, in the event it shall find that the errors assigned are well taken, to reinstate the judgment for $20,000 and costs, dated April 11, 1912, as rendered in favor of the executrix at the first trial.

(*a*) *Jurisdiction of Court of First Instance.*

There is no question but that the circuit courts of Kentucky, including the Warren Circuit Court, in which this action was brought and tried, are State courts—

> "of general jurisdiction, are empowered to take cognizance of actions to recover for personal injuries and for death, and are accustomed to exercise that jurisdiction, not only in cases where the right of action arose under the laws of the State, but also in cases where it arose in another State, under its laws, and in circumstances in which the laws of Connecticut (Kentucky) give no right of recovery (223 U. S., p. 57."
>
> L. & N. R. R. Co. *vs.* Melton, 218 U. S., 36, 47.

The attack made upon the constitutionality of the statute upon certain grounds specified in the special demurrer (R., 6) has been practically abandoned by reason of decisions of this court to the contrary, and, as the facts averred and proven clearly bring the case within the purview of the Federal Employers' Liability Act, the trial court undoubtedly had jurisdiction.

Second Employers' Liability cases, 223 U. S., 57-59.

Seventh Amendment to Constitution.

Although at the second trial, as will hereafter be discussed, the Railroad Company requested the court to give an instruction to the effect that a unanimous verdict of the jury was essential *as against the defendant*, it was nowhere claimed, either at the first or second trial, that the jury of twelve men, as actually chosen, agreeably to the laws of Kentucky, was not a common-law jury.

Thus, even should this court be disposed to hold—what counsel for defendants in error in cases Nos. 321, 399, 453, 473, 485, and 743 have denied and argued by separate brief—that the Employers' Liability Act contemplates a common-law jury in State courts in the enforcement of the rights thereby conferred, it cannot be successfully contended that the circuit courts of the various counties of Kentucky are without power to entertain jurisdiction of a case

of this charteter, its juries, as drawn, being composed of twelve qualified men.

It is true that the constitution and laws of Kentucky permit nine or more jurors to bring in a verdict; yet both the State constitution and the statute specifically state:

> "But where a verdict is rendered by a less number than the whole jury, *it shall be signed by all the jurors who agree to it.*" (Italics supplied.)
> Sec. 248, Kentucky Constitution.
> Sec. 2268, Kentucky Statutes (Carroll).

Thus the laws of Kentucky not only provide a common-law jury of twelve, but also a sure measure whereby to determine from the face of the verdict whether it is a unanimous verdict or not.

In the case at bar the verdict was the unanimous verdict of twelve men, against the regularity of whose selection no question was raised.

Therefore, however this court may be disposed to treat Kentucky verdicts of less than twelve, we submit that, even the most extreme view which the court might take of the applicability of the Seventh Amendment to the trial of Federal Employers' Liability Act cases in the State courts, the actual unanimous verdict of twelve jurors, as in the case at bar, would hardly be disturbed.

> C. & O. Ry. Co. *vs.* Kelley's Admr., 171 S. W., 185, 186.

There was undoubtedly jurisdiction on the part of the trial court to entertain and try the action.

(*b*) *Jurisdiction of This Court.*

It will hardly be denied that a party who has asserted a right, privilege, or immunity under a Federal statute and has been deprived thereof by judgment of a State court can

be deprived of a right to a review by writ of error from this court to the appropriate State court.

Nutt *vs.* Knutt, 200 U. S., 12.

The chief justice of the Court of Appeals of Kentucky has recognized this right in the case at bar by allowing the writ.

Even where the right was erroneously asserted under the Federal Employers' Liability Act, this court will hear and determine the case on its merits.

Shanks *vs.* D., L. & W. R. R. Co., 239 U. S., 556.

It will be contended by the Railroad Company, however, that the writ of error should have been taken within two years from the judgment of reversal of February 27, 1914 (R., 110), and not from the final judgment of March 26, 1915 (R., 218).

The answer to this is that, measured by the plain and unequivocal language of this court repeatedly uttered, the judgment of February 27, 1914 (R., 110), reversing the judgment for $20,000 of April 11, 1912, remanding the case to the trial court for a new trial and "for further proceedings consistent with the opinion and modified opinion herein," was not a final decision or judgment within the meaning of the statute, and no writ of error from this court to the State court would then have been allowed.

C. & O. Ry. Co. *vs.* McCabe, 213 U. S., 207, 214.
La. Nav. Co. *vs.* Oyster Commission, 226 U. S., 99, 102.

In the McCabe case (*supra*) there was three trials by the Mason County Circuit Court, Kentucky, and two reversals and one affirmance by the court of appeals of that State, and Mr. Justice Day, speaking for this court, said:

> "Upon the second appeal the judgment for the plaintiff below was reversed, and the cause remanded

for a new trial. Upon the third trial a judgment was rendered in favor of the plaintiff below for damages, which was affirmed in the Court of Appeals of Kentucky, to which judgment this writ of error is prosecuted. *Nor is it material that the State Supreme Court regarded itself as bound by the decision in the former appeal as the law of the case* and declined in the judgment now under review to again consider the question. *The judgment under review was the only final judgment in the appeal court of the State from which plaintiff in error could prosecute a writ of error, and until such final judgment the case could not have been brought here for review.*

"Schlosser *vs.* Hemphill, 198 U. S., 173, and cases therein cited." (Italics supplied.)

Power and Duty to Reinstate Original Judgment.

In the later case, Louisiana Navigation Company *vs.* Oyster Commission (*supra*), the present chief justice of this court cited the McCabe case with approval, and said:

"The rule which excludes the right to review questions arising in a cause depending in a State court until a final judgment is rendered by such court involves *as a necessary correlative the power and the duty in this court, when a final judgment in form is rendered* and the cause is brought here for review *to consider and pass upon all of the Federal controversies in the cause irrespective of how far it may be that by the State law such questions were concluded during the litigation and before a final judgment susceptible of review here was rendered.*

"Chesapeake & Ohio Ry. Co. *vs.* McCabe, 213 U. S., 207, 214." (Italics supplied.)

Thus is made clear that it is within "the power and duty" of this court to take jurisdiction under the writ of error in No. 904, and, if the errors assigned are sustained, to proceed by appropriate judgment to restore to the original plaintiff in the action the rights of which she and those

whom she represents have been deprived by the reversal of the original judgment for $20,000 of April 11, 1912.

This can alone be done by giving directions for the reinstatement of said judgment for $20,000 and costs.

In addition to the last two cases cited, the attention of the court is invited to the following additional authorities:

Campbell *vs.* N. W. Eckington Imp. Co., 229 U. S., 561, 585.

Perkins *vs.* N. P. Ry. Co., 199 Fed., 712, 719.

Coit *vs.* Sistare *et al.*, 85 Conn., 573.

Ann. Cas., 1913C, vol. 28, p. 248—note 250 (prior decision in this court—Sistare *vs.* Sistare, 218 U. S., 1).

Ragan *vs.* Cuyler, 24 Ga., 397, 400.

Hill *vs.* the W. Chicago Park Coms., 185 Ill., 150.

Cahill *vs.* Likenthal, 62 N. Y. Sup., 525.

Muse *vs.* Stern, 82 Va., 33, and cases cited.

Green Co. *vs.* Thomas, 211 U. S., 598, 602-3.

does not cite. yet 240 U.S. (after 2/16)

In one of these recent cases the original decree of the trial court had been twice disapproved and once reversed by the intermediate appellate court, yet Mr. Justice Pitney, in delivering the opinion of this court, reversed both decrees of the Court of Appeals of the District of Columbia,

> "and the cause was remanded with directions to *reinstate* and affirm the decree of the Supreme Court of the District of Columbia bearing date January 4, 1906, and *to reverse and set aside all subsequent decrees so far as inconsistent therewith.*" (Italics supplied.)
>
> Campbell *vs.* N. W. Eckington Imp. Co., 229 U. S., 561, 585.

In other cases cited a similar course was pursued with respect to the reinstatement of judgments at law.

Thus it will be seen that this court not only has jurisdiction to entertain the cross-writ of error and to correct the

errors, but that the same is coupled with the power and duty to reinstate the judgment.

II.

Motion to Quash Cross-Writ of Error.

The Railroad Company served on counsel a proposed motion in case No. 485, so termed, with brief in support thereof.

No effort will be made either to characterize or give a place under the rules of practice of this court to this motion.

So far as it may attempt to attack the jurisdiction of this court over case No. 904, it is believed the above argument under the head of "Jurisdiction of This Court," as well also as the authorities cited in the Company's brief in support thereof, including the McCabe case, sufficiently negatives the attack.

To the extent that said motion and brief relate to the merits of the assignments of error of the Administratrix, reference is made for reply to the discussion of those assignments below in this brief.

The suggestion that the right conferred by the statute to the Administratrix to sue out her writ of error at any time within two years from the date of final judgment is limited by any law or principle requiring her to seek and obtain the allowance of the writ at a much earlier date and within the term of this court in which the other party to the same action sues out its writ is not well founded, and the authorities cited on page 5 of the brief in support of the motion do not sustain the contention.

Grigsby *vs.* Purcell, 99 U. S., 505.
U. S. *vs.* Burchard, 125 U. S., 176.
The S. S. Osborne, 105 U. S., 447.
The Tornado, 109 U. S., 110.
Hilton *vs.* Dickson, 108 U. S., 165.

Briefly stated, these authorities do hold that after an appellant or plaintiff in error notes an appeal in the lower court and this court acquires jurisdiction it is encumbent upon such appellant or plaintiff in error to proceed without undue delay to docket his case in this court and to become active in its prosecution here, and, if a term of this court is allowed to pass without his doing so, the appeal or writ of error may be dismissed *on the theory of laches,* either on the motion of the appellee or defendant in error or by the court on its own motion.

The present rule of the court (Rule 9-1) supplies appellees and defendants in error with a specific remedy whereby they may docket a case for the purpose of having the same dismissed. The same rule, sub-paragraph 2, guarantees to the plaintiff in error or appellant the right to have his case "stand for argument" in the event the case is docketed and a copy of the record is filed by him with the clerk of this court before the return day.

In the case at bar the Administratrix not only filed her record, docketed her case (904), and ordered the record printed prior to the return day in her case, but within a week of the time she filed her assignments of error and petition for writ in the Court of Appeals of Kentucky.

The Railroad Company, as defendant in error in that case, has not only not availed itself of the remedy provided by the rules for speeding such a case, but there has been absolutely no basis in fact on which to base a motion on its part to docket and dismiss.

Hence its motion in case 485 to quash cross-writ of error.

III.

Reversal Based on Federal and Not State Questions.

Preliminary to a more detailed discussion of the assignments of error, the attention of the court is called to the fact that all the questions decided adverse to the Administra-

trix in the opinion of the Court of Appeals of December 19, 1913 (R., 104-9), and the modified opinion of February 27, 1914 (R., 109), mentioned in the judgment of reversal (R., 110), as made final by the final judgment of March 26, 1915 (R., 218), were Federal as contradistinguished from State questions.

It is true that the Railroad Company contended that the complaint was defective in not having made more specific the allegations of negligence, but the Court of Appeals correctly held that this was a question of local practice and *decided the same in favor of the Administratrix* (R., 107), saying:

> "So that the general allegation of negligence being held sufficient in this State prior to the enactment of the Employers' Liability Act, such a plea will be held good even when proceeding under that act."

We shall, therefore, pass to a discussion of errors assigned after presenting a single extract from one of the more recent decisions of this court:

> "It is well settled that where the State court does not decide against the plaintiff in error upon an independent State ground, but, deeming the Federal question to be before it, actually entertains it and decides it adversely to the Federal right asserted, this court has jurisdiction to review the judgment," etc.
>
> Rogers *vs.* County of Hennepin *et al.*, 239 U. S., 621.

IV.

Crucial Error—Apportionment of Verdict.

The third assignment would seem appropriate to present first, because it points out at least one error which the opinion on rehearing cannot be construed as being intended to correct. It is as follows:

> "That the Court of Appeals of Kentucky, in reversing said judgment for this plaintiff in error for

> $20,000 based upon the verdict of a jury rendered without the defendant in said action asking the trial court to instruct the jury to apportion the damages, erred in proceeding upon the hypothesis that such apportionment was essential to a valid judgment under said act of Congress and that it was the duty of the trial court to instruct the jury to apportion the recovery between the beneficiaries; whereas said act of Congress has been construed directly to the contrary by the Supreme Court of the United States in a similar case, Central Vermont Railway Company *vs.* White's Administratrix, decided June 21, 1915" (238 U. S., 507).

The Court of Appeals of Kentucky apparently went upon the hypothesis that the case of Gulf, Colorado, &c., Ry. Company *vs.* McGinnis, 228 U. S., 173, was controlling as applied to the case at bar. In this McGinnis case there was one married daughter of decedent, whose dependency was neither alleged nor proven and the trial court was requested, but declined, to instruct the jury that it could not find any damages in her favor, whereas in the case at bar it was both averred and proved that all of the beneficiaries, the widow and three minor children, were dependents, and no request was made by the Railroad Company for an instruction directing apportionment of the verdict among the beneficiaries.

In fact the case at bar was on all fours with that mentioned in the third assignment of error, wherein this court (syllabus) held:

> "7. A general verdict for the plaintiff may be returned by the jury in an action brought by the administratrix under the Federal Employers' Liability Act of April 22, 1908, for the benefit of the widow and minor children of the deceased employee *without apportioning the damages between the beneficiaries.*" (Italics supplied.)

In delivering the opinion of this court in that case Mr. Justice Lamar said:

"Under Lord Campbell's act (9 & 10 Vic., chap. 93, §2) and in a few of the American States the jury is required to apportion the damages in this class of cases. But even in those States the distribution is held to be of no concern of the defendant, and the failure to apportion the damages *is held not to be reversible error* (Norfolk & W. R. Co. *vs.* Stevens, 97 Va.., 631 (1), 634; 46 L. R. A., 367; 34 S. E., 525; International & G. N. R. Co. *vs.* Lehman—Tex. Civ. App., 72 S. W., 619)—*certainly not unless the defendant can show that it has been injured by such failure.* The Employers' Liability Act is substantially like Lord Campbell's Act, except that it omits the requirement that the jury should apportion the damages. That omission clearly indicates an intention on the part of Congress to change what was the English practice so as to make the Federal Statute conform to what was the rule in most of the States in which it was to operate. Those statutes, when silent on the subject, have generally been construed not to require juries to make an apportionment. Indeed, to make them do so would, in many cases, double the issues; for, in connection with the determination of negligence and damage, *it would be necessary also to enter upon an investigation of the domestic affairs of the deceased*—a matter for probate courts, and not for jurors. If, as in the McGinnis case, the *plaintiff sues for the benefit of one who is not entitled to share in the recovery* (citing cases), *and if her inclusion in the suit might increase the amount of the recovery,* the defendant may raise the question in such mode as may be appropriate under the practice of the court in which the trial is had, so as to secure a ruling *which will prevent a recovery for one not entitled to share in the benefits of the Federal act.* But no such question was *or could have been raised in the present case, since, as a matter of law, the wife and minor children were all to be treated as entitled to share in the amount recovered for the death of the husband and father.*" (Italics supplied.)

And yet the Court of Appeals in the case at bar reversed the judgment based on the verdict *in solido* for the benefit of

the widow and minor children of decedent, and, in remanding the case for a new trial, gave the following directions (R., 108-9):

> "The court will also upon the return of the case give such instructions to the jury *as will apportion the ultimate recovery,* if any, *between the beneficiaries* as is suggested by the Supreme Court in the case of Gulf, Colorado, etc., Ry. Co. *vs.* McGinnis, 228 U. S., 172." (Italics supplied.)

On rehearing (R., 109) the court said:

> "Overlooking for the instant that the case was tried under the Federal Employers' Liability Act, and by reason of the haste and confusion incident to the closing day of the term of this court, the Kentucky rule as to the measure of damages was incorrectly directed to be given on another trial instead of the measure of damages prescribed by the Federal statute."

An equally serious error, of course, was committed with regard to the necessity for an apportionment of verdicts, but the modified opinion (R., 109) contains no language which can be construed as correcting this error. Quite the contrary, for the decision of the court in C. & O. Ry. *vs.* Dwyer's Administratrix, 157 Ky., 590, referred to as the criterion on the measure of damages, specifically held, as more particularly set forth below, that the jury should have been instructed to apportion the same in their verdict.

Indeed, as will appear from the discussion to follow, there was so little semblance of ground for reversible error in what was left that we have been inclined to think that the erroneous conception by the court on the subject of apportionment of verdicts probably accounts for the failure of the Court of Appeals to affirm the judgment on rehearing.

If this idea is correct, the most charitable view which could be taken with regard to the errors on which the balance of the assignments are based is that the language used

by the appellate court was by way of a lecture for the edification and guidance of the trial court in a case whose retrial was considered inevitable by reason of its failure to require an apportionment of the verdict on the first trial.

The crucial error corrected, the valid judgment based upon the valid verdict should be reinstated.

V.

No Error Prejudicial to Railroad.

Under this head will be discussed the fourth, fifth, sixth, and seventh assignments of error.

Inasmuch as all the alleged errors mentioned by the Court of Appeals, except that last above discussed, were based upon alleged errors on the part of the trial court in its instructions to the jury at the first trial, it is deemed appropriate to state that the Railroad Company did not propose at the trial an instruction on a single point forming the subject-matter of comment or ruling by the Court of Appeals adverse to the Administratrix.

Furthermore, even where the Railroad Company excepted to an instruction to the jury, the ground of its objection was not stated and the character of the alleged errors were not pointed out in the trial court.

On this point, and as preliminary to a more detailed argument of the particular points, the attention of the court is respectfully invited to a decision of this court on writ of error to a State court, rendered as late as January 31, 1916, in which it was (syllabus) held that—

> "The failure of the trial court particularly to specify in its charge in an action under the Federal Employers' Liability Act of April 22, 1908 (35 Stat at L., 65; Chap. 149 Comp. Stat., 1913, §8657), some matters to which its attention was not suitably called, is not ground for reversal."
>
> Ill. Cent. R. R. Co. *vs.* Skaggs, 240 U. S., 66.

In this case Mr. Justice Hughes, for the court, said:

> "While under the local statute (Gen. Stat. Minn., §7830) the plaintiff in error was permitted (without taking exceptions at the trial) to specify upon a motion for a new trial alleged errors in the rulings or instructions of the trial court, *we do not find that this statute alters the salutary rule that a party is not entitled to sit silent until after the verdict and then insist that it shall be set aside because of failure on the part of the trial court to particularly specify in its charge some matter to which its attention had not been suitably called.*"

In the case at bar the objections were general as to all the instructions as given by the court, and, even in the Company's motion for a new trial (R., 18-19), none of the alleged errors mentioned by the Court of Appeals were pointed out, *and instruction 4 (on contributory negligence) was omitted altogether.*

In the light of all this let us proceed to a discussion of these assignments of error.

(a) *Instruction 4—Contributory Negligence.*

In the decision of the Court of Appeals of December 19, 1913 (R., 108), on this point the court said:

> "Instruction No. 4 *should be* given on a new trial in conformity with the rule laid down in Nashville, Chattanooga & St. Louis Railroad Company *vs.* Banks this day decided, 156 Ky., 609." (Italics supplied.)

It is a matter of conjecture with counsel whether or not the Court of Appeals intended by this reference to indicate that in its opinion the trial court committed reversible error in giving the instruction on the subject of contributory negligence at the first trial. We feel sure no such error was committed. Out of abundant precaution we have embraced this feature in our fifth assignment of error.

The trial court on the first trial voluntarily gave the following:

> "Instruction No. 4.—The court instructs the jury that in the operation of defendant's train it was the duty of plaintiff's intestate as engineer to exercise ordinary care for his own safety and if he failed to exercise such care and his own negligence contributed in any way to produce the injuries, if any, complained of in the petition, then to the amount of such negligence, if any, attributable to said Stewart, the jury shall diminish the damages, if any, which may be found by them, if any at all, under these instructions."

Assuming, for the sake of argument, that the court had amplified the subject of comparative negligence and had explained the same to the jury, in the language of Mr. Justice Van Devanter used in the opinion in N. & W. Ry. Co. *vs.* Earnest, 229 U. S., 114, then we submit that *the result of such instruction could not be more beneficial to the Railroad Company than the instruction given. There was no evidence before the jury on which to find any negligence whatsoever.*

The giving of any instruction on the subject, therefore, while detrimental to the plaintiff, could not have been prejudicial to the Railroad Company.

At the time of the injury decedent was obeying the orders of his conductor and was moving the train in obedience to the conductor's signals.

The Railroad Company did not request the court to give an instruction on the subject. On the contrary, it had, in effect, abandoned this defense. It introduced no evidence in support of such defense. Upon the conclusion of the evidence at the first trial the Company tendered for leave of court to file (*"to conform to the proof"*) its amended answer (R., 27-28), asserting the defense of assumption of risk, and in which it was affirmatively averred (R., 28)—

> "that said Stewart's alleged injury * * * *was the result of the jerking and jarring of the train under the circumstances as above set out,"* etc.

And the alleged circumstances so set out nowhere charged or imputed, or undertook to impute, to the decedent any negligence on his part in the premises whatsoever.

Furthermore, the Railroad Company, by its motion for new trial (R., 18, 19), made no reference to and did not claim error on the part of the trial court in giving said voluntary instruction No. 4.

Under these facts, even if there had been error in the form of the instruction, which is denied, it could only have tended to the disadvantage of the Administratrix and could not by any possibility be held to be prejudicial error as against the Railroad Company. And by its conduct the Company was and is estopped to assert prejudicial error by reason of said instruction.

(*b*) *Measure of Damages.*

This question forms the subject-matter of our fourth assignment of error, wherein is more particularly set forth the trial court's instructions 1 and 2, the comment thereon by the Court of Appeals in its opinion of December 19, 1913 (R., 108), and its repudiation of its own position (R., 109) by modified opinion on rehearing February 27, 1914. As will also appear in the fourth assignment, the trial court is directed on retrial to follow the course as "pointed out in the case of C. & O. Ry. *vs.* Dwyer's Administratrix, 157 Ky., 590," and in which last-mentioned decision, as rendered two days before, February 23, 1914, the Court of Appeals, after discussing decisions of this court in the McGinnis, Vreeland, and Didricksen cases, found that—

> "The *recovery should have been confined by the instruction on the measure of damages,* in the event of a finding for the plaintiff, *to such a sum in dam-*

> *ages as would reasonably compensate the widow and children of the decedent for such pecuniary benefits as the evidence might show they had a reasonable expectation of receiving from the decedent,* if his death had not been caused by the negligence of the defendant, if it was so caused; and after thus finding for the plaintiff a sum sufficient to compensate all the beneficiaries named, *it should have been apportioned by the jury among the beneficiaries,* stating in their verdict how much, if anything, they find for each of them; the damages altogether not to exceed the amount claimed in the petition." (Italics supplied.)

In the Vreeland case, 227 U. S., at page 71, this court expressly stated that the word "pecuniary"

> "as judicially adopted is not so narrow as to exclude damages for the loss of services of the husband, wife, or child, and, when the beneficiary is a child, for the loss of that care, counsel, training and education which it might, under the evidence, have reasonably received from the parent, and which can only be supplied by the services of another for compensation."

The restrictive language quoted from the instructions given by the Court of Appeals in the Dwyer case, as made applicable by the court in its modified opinion to the retrial ordered, not only contains the error forming the subject-matter of our third assignment of error (apportionment of verdict), but was so restrictive in its terms as to exclude the idea and practical benefits to the children of decedent, so declared by this court in the Vreeland case to be within the rights conferred on them by the Federal statute.

By way of parenthesis, it may be said that the trial court, on the second trial, followed these erroneous directions by not only requiring an apportionment of the verdict but also expressly prohibiting the jury from considering "the proof as to decedent's habits of industry and sobriety, *only as affecting his power to earn money*" (instruction 2, R., 120), thus excluding from the consideration of the jury the equipment

in "habits of industry and sobriety" of the parent, in determining the amount of the pecuniary costs of providing for these children the care, counsel, training, and education which they might have reasonably received from the parent.

But the effect of this action of the Court of Appeals on the second verdict is a matter apart from the subject now under consideration, namely, did the instruction as actually given by the trial court at the first hearing affect prejudicially the Railroad Company? We say it did not. On the contrary, the instructions as actually given at the first trial on the subject of the measure of damages was prejudicial to the dependents of decedent, and, furthermore, the conduct of the Railroad Company in respect to the result brought about estops it from picking technical flaws in the instruction given and of trying to avail itself of such benefits as could be involved in the Court of Appeals considering the same as an element, if it did so treat the instructions, in its reversal of the original judgment of the trial court.

By a careful reading of instructions numbered 1 and 3, as set forth in full in the fourth assignment of error above, it will be seen that said instructions are both sound in pecuniary damages, as contradistinguished from any other character of loss. Therefore they did not even tend to increase the damages above the pecuniary loss. On the contrary, these instructions wholly failed to point out or convey the idea that the jury should have assessed for the loss of that care, counsel, training, and education which the children might, under the evidence, have reasonably received from the parent, and which can only be supplied by the services of another for compensation. In fact, by the third instruction on this first trial, the trial court said—

> "but his habits of industry and sobriety are not to be considered by them *except for the purpose of showing his power to earn money.*" (Italics supplied.)

Contributing as it did to the character of instructions given by the court, as suggested in the outset of this branch of the

argument, the Railroad Company utterly failed at the trial either to offer an instruction on the subject itself or to point out to the court wherein the instructions given were either technically or substantially defective. Furthermore, as to the aforesaid substantial defect, *wholly prejudicial to the dependents of decedent*, the Railroad Company actively participated. It filed a motion to strike from the petition (R., 11) averments on which this element of the damages could be predicated, and, by objection to the introduction of testimony (R., 29 *et seq.*), it sought to have eliminated evidence of important facts bearing directly upon this phase of the subject.

Such substantial error as was made in the instructions on the measure of damages at the first trial, we submit, tended toward the injury of the dependents of decedent and was not in any sense prejudicial to the Railroad Company. Such technical defects as may be found in said instructions were innocuous, and their existence was contributed to by the silence of the Company when it was its duty to speak.

There was no error in the instructions on the measure of damages prejudicial to the Railroad Company.

(c) *Negligence of Flagman Hill.*

By the sixth assignment errors are pointed out in the decision of the Court of Appeals of December 19, 1913, on the subject of the negligence of the rear flagman, Hill, which can only be of importance in the event this court should fail to reinstate the judgment obtained at the first trial.

This error could not have been the cause of the reversal of the original judgment of the Court of Appeals, because, in its said decision of December 19, 1913 (R., 107), the Court of Appeals expressly found that there was negligence on the part of the Railroad Company in the premises. Furthermore the court in said decision sustained the action of the trial court in overruling the demurrer to the evidence and in refusing to give a peremptory instruction.

Concluding this branch of the argument it is deemed not

inappropriate to say that having discussed each error alleged in the opinions of the Court of Appeals on the first appeal and shown that the position of that court was either not well founded in law or that such semblance of error as there was in the instruction of the trial court was unsubstantial as against the Railroad Company, the conclusion is irresistible that there was no error in the first trial prejudicial to the Railroad Company. The action of the Court of Appeals, therefore, in reversing the original judgment and ordering a new trial constituted a substantial, although not an immediately appealable, judgment adverse to the plaintiff in the action and cross-writ of error.

VI.

Reinstatement of First Judgment.

The first and second assignments of error embody the idea of the error involved in rendering final, by the judgment of March 26, 1915 (R., 218), the previous non-appealable judgment of reversal (R., 110) of February 27, 1914.

In view of the language of this court in the McCabe case, on writ of error to the same State court, which was quoted in the opening branch of this argument (p. 15), it is immaterial that the Court of Appeals of Kentucky should feel itself or be bound by its own judgments of reversal. When a case, pending in the State courts of Kentucky, reaches the stage where a final judgment is rendered and a writ of error is sued out, then this court for the first time acquires jurisdiction, because of the rule which this court has established in the construction of the statute governing its jurisdiction to review on writ of error the final judgments of the highest courts of the States. The effect of the rule is so tersely stated by the Chief Justice of this court in Louisiana Navigation Company *vs.* Oyster Commission (*supra*) that we quote it again:

> "The rule which excludes the right to review questions arising in a cause depending in a State Court until a final judgment is rendered by such court involves *as a necessary correlative* the power and the duty in this court when *a final judgment in form is rendered* and the cause is brought here for review, to consider and pass upon all of the Federal controversies in the cause, irrespective of how far it may be that by the State law such questions were concluded during the litigation, and before a final judgment susceptible of review here was rendered." (Italics supplied.)

In the case at bar all questions decided adverse to the plaintiff in error in the cross-writ of error being Federal and all State questions having been decided in her favor, in the light of the decisions in the McCabe and Louisiana Oyster Commission cases, it would seem to be unnecessary to enter upon a discussion of the question of how impossible it was to expect the Court of Appeals, after the second trial was had, to set aside its former judgment of reversal of the judgment obtained at the first trial. It is enough to say that, in contemplation of the Federal law as thus so clearly declared by this court, the final judgment of March 26, 1915, involved by necessary inference or intendment the ratification and confirmation by the Court of Appeals of its prior decisions and judgment adverse to the administratrix and those whom she represents.

In other words, the error committed by the Court of Appeals of Kentucky in reversing the original judgment of the trial court in favor of the administratrix was carried into and became perpetuated by the final judgment of that court of March 26, 1915, and, in effect, undertook to substitute for the original judgment for $20,000 with costs, the lesser judgment of the second trial for $11,885 with costs and damages.

This, of course, constitutes the error of which complaint is made, and all the other errors, on each of which we insist, culminate in this one.

Having shown, under other branches of the argument, that there existed no error in the first trial on which the reversal

could appropriately be made, and, therefore, that there was no justification for a perpetuation of the injury through final judgment, it follows logically that the original judgment should be reinstated and, with such reinstatement, of course, all the proceedings following and predicated upon the basic error of reversal must count for naught.

In view of the authorities presented bearing directly upon this proposition under the head of "Jurisdiction," subhead "Power and Duty to Reinstate Original Judgments (pp. 16-17) above, it is deemed unnecessary to cite further authority here.

It is respectfully submitted that this cross-writ of error should be sustained and that the original judgment as obtained at the first trial for $20,000 and costs should be reinstated under the directions appropriately made by this honorable court.

PART II.

VII.

Response to Writ of Error in No. 485.

The assignments in support of the cross-writ of error (No. 904) are confined to those errors of the Court of Appeals by which the administratrix is sought to be deprived of the judgment rendered at the *first* trial. If this court shall sustain this cross-writ and direct the reinstatement of that judgment, the judgment rendered at the second trial would necessarily be supplanted and eliminated by said *first* judgment, without the necessity for any consideration being given by this court to the *second* trial.

Should this court not sustain said cross-writ and reinstate the first judgment, then the second judgment must stand, unless this court shall find, on the assignments of

the railroad company, that error prejudicial to the company was committed in both courts below.

As such errors as were committed at the second trial of a prejudicial character were *against* the *administratrix* and in *favor* of the *railroad company* we apprehend no such action by this court.

At the end of six years of litigation with the company over the loss (nearly eight years ago) of the family bread winner to the administratrix the matter of bringing the litigation to a speedy conclusion has become an intensely practical question. If the court does not restore the first judgment, the administratrix, whose limitation of endurance in the unequal contest is well-nigh reached, must take the amount of the *second* judgment, with costs, interest, and damages below, together with such damages and costs as this court may see fit to allow under its Rule No. 23.

Hence the assignments on cross-writ of error were not so framed as to seek a *third* trial, but rather to have *restored,* by this court, *the original judgment,* which we have argued above should never have been reversed by the Court of Appeals.

Still insisting upon the right of the beneficiaries to a reinstatement of the original judgment, it is deemed appropriate to proceed to a discussion of the questions involved in the writ of error as sued out by the railroad company.

VIII.

Alleged Judgment of April 29, 1915.

In the opening paragraphs of this brief (pp. 2, 3) attention was called to the fact that there is no judgment in the record as presented corresponding in date (April 29, 1915) to that mentioned in the petition of the railroad company for the allowance of its writ of error here under discussion (R., 222).

The final judgment in the court below, according to the record, consists of the "judgment of affirmance of the Court of Appeals entered herein on the 26th day of March, 1915" (R., 218). T. P. R. R. Co. *vs.* Gentry, 163 U. S., 353.

It is respectfully suggested that the judgment of affirmance was the proper basis for the writ of error; and that, in any event, there is no order of April 29, 1915, in the record whereon to base the writ of error, as allowed by the chief justice of the Court of Appeals therefrom.

Without further discussion of this phase of the matter, but not conceding that the writ of error has been properly taken, we will pass to a discussion of the alleged errors as assigned by the railroad company as if same were based upon final judgment of March 26, 1915 (R., 222).

IX.

Alleged Immunity from Costs, Interest, and Damages.

The first assignment of error on behalf of the railroad company asserts the remarkable proposition that, in the absence of affirmative provision in the Federal Employers' Liability Act therefor, the proper court of the State in which the deceased employee resided at the time of his death, and in which State the railroad company is chartered, is powerless to apply the State law and practice in the following particulars, to wit:

(*a*) By including in the judgment the costs of the action so brought in the State court to enforce the right created by the Federal statute;

(*b*) By permitting the principal of the judgment to bear the legal rate of interest from date of the judgment; and, furthermore.

(*c*) That the Court of Appeals of said State may not comply with the State statute (sec. 764, Code of Civil Practice) requiring that court, "upon the affirmance of an appeal

from a judgment for the payment of money, the collection of which has been superseded," to award "against the appellant" "ten per cent damages on the amount superseded."

It does not appear by the record that propositions (*a*) or (*b*) were raised by the railroad company in the trial court, either before or after judgment, or that any of the propositions were raised in the Court of Appeals prior to the filing of the assignment of errors preliminary to the allowance of the writ of error.

Apparently mistaking the distinction between basic rights, granted by the Federal statute, and matters incident to the enforcement of those rights through the State courts, the company in its brief quotes from the decision in Michigan Central Railroad *vs.* Vreeland, 227 U. S., 59, 66, to the effect that—

> "We may not piece out this act of Congress by resorting to the local statutes of the State of procedure or that of the injury."

Mr. Justice Lurton, of course, had reference here to the fact that the right of action accorded to the decedent as such, under the statute, lapsed upon, and that his individual cause of action did not survive, his death. Of course, as the right did not originate under any State statute, it was immaterial what the local statute may have provided with respect to the survivorship of causes of action granted by the State law.

This, however, is no authority for the contention that the railroad should be immune from the ordinary costs incident to the establishment of the right in State court, or from interest on a judgment rendered pending payment, or damages under supersedeas statute in the event it shall not prosecute its appeal with effect.

Neither does the case at bar fall within the principle involved in New York State court decision, cited by counsel on page 19 of their original brief, to the effect that interest upon the verdict *"from the time of the death of the plain-*

tiff's intestate," could not be allowed under a State statute which the court held had no application to the action in question based on the Federal Employers' Liability Act.

To what extent this New York decision has been, or may be, used as authority for extreme rulings upon the subject, it is needless here to inquire.

There is not involved, in any one of the three elements forming the subject-matter of the assignment of error under discussion, a departure from the universal application of the Kentucky laws of procedure to litigation in the courts of that State, laws which, by necessary implication, must apply to the litigation of rights in the courts of that State regardless of the origin of the rights or citizenship of the litigants.

The railroad company, though including the item of costs in the assignment of error, does not press this particular feature in their argument.

It is, however, quite as well founded in principle as either of the other two points, because the Federal statute conferring the right is quite as silent on the subject of the award of costs of actions to enforce the right as it is silent on the subject of interest on such judgment from the date of its rendition and the orderly application of the State law to the computation, as a matter of course, of the damages upon the amount superseded upon the unsuccessful termination of an appeal from a judgment superseded.

If the silence of the statute has the effect, as contended, of granting immunity from costs, interest, and damages in the State courts, the same must be equally true where resort is had to Federal courts in actions brought for the enforcement of the rights conferred by the statute.

This court in passing on such cases has not only uniformly required the unsuccessful railroad company in such cases to pay the costs in this court and repeatedly adjudged costs against them in affirming the judgments of both State and Federal courts; but this court has also not hesitated to ex-

ercise its general authority, under section 1010, U. S. R. S., and agreeably to Rule 23, by imposing damages against interstate carriers for frivolous writs of error based on judgments obtained under this very statute.

Southern R'y Co. *vs.* Gadd, 233 U. S., 572.

If section 1010 can be applied at the option of this court as a penalty, surely section 764 of the Civil Code of Kentucky, constituting as it does a uniform means for the enforcement of the supersedeas law of that State, was likewise enforcible through the Court of Appeals of Kentucky.

If these laws and both State and Federal laws as to costs apply by necessary implication to actions under the Federal Employers' Liability Act, it would seem that the State statute on the subject of interest, expressly made the law applicable to action in Federal courts by section 966, U. S. R. S., must apply to judgments under the Federal Employers' Liability Act obtained in State courts as well as those obtained in Federal courts.

Kentucky Statutes (Carroll), § 2220, Act December 3, 1892.

Furthermore, all of these features of the judgment below, arising as they do as mere incidents of the procedure in the State court for the enforcement of the rights conferred by the statute, present purely State questions, which this court will not review on writ of error.

Thus it seems clear that the proposition raised by the first assignment of errors is untenable in all of its phases, and that the railroad company will not be granted by this court immunity from that part of the judgment below denominated as costs, interest on the judgment, and damages under the State supersedeas statute.

X.

Common-Law Jury.

It is observed that no objection was raised by the company to the installation of the jury, or to any inherent defect in the composition of the State court, with special reference to any infirmity in the agencies of that court, as measured by the Seventh Amendment to the Federal Constitution.

The subject-matter of the sixth assignment of error, in any possible bearing the same may have on the jurisdiction of the trial court, is briefly discussed above under the head of the jurisdiction of the trial court, page 13 and 14.

And the question of the alleged application of said Seventh Amendment to the trial in State courts of actions arising under the Federal Employers' Liability Act is separately treated in the joint brief of defendants in error in cases in this court at this term numbered 321, 399. 453, 473, 485, and 743.

Inasmuch as the verdict on which the judgment was entered was the unanimous verdict of a jury composed of twelve qualified jurors, the railroad company could not have been prejudicially affected either by the refusal of the trial court to grant the instruction proposed by it or by giving the instruction on the subject, both more particularly set forth in the sixth assignment of errors.

While it is believed that the action of the trial court in both particulars was correct, yet, in the absence of prejudicial error, the time of the court will not be consumed with further argument on the subject.

XI.

Comparative Negligence.

By the railroad's fourth assignment error is charged on the part of the Court of Appeals in not reversing the judgment by reason of the form of the fourth instruction of the trial court on the subject of comparative negligence.

Inasmuch as there was no evidence showing or tending to show that the deceased engineer was negligent, even in the slightest degree, the giving of any instruction whatsoever on the subject of contributory negligence tended to the prejudice of the administratrix and could not have operated to the injury of the railroad. The Court of Appeals could not have erred in this particular.

The language of the trial court's instruction on the subject at the second trial was identical with that contained in its instruction No. 4 at the first trial.

The railroad company at the second trial introduced no testimony on the subject of contributory negligence and proposed to the court no instruction upon the subject of comparative negligence. Neither did it point out to the court, either before the jury retired or in its motion for a new trial, any alleged defect in the instruction as given by the court on this subject.

The undisputed evidence was that at the time of the injury the deceased engineer was moving the train under obedience to and under constant signals from the conductor of the train.

It is deemed unnecessary, therefore, to further discuss this assignment; but the attention of the court is called to the extract from a recent decision of this court, pages 24-25 above, and also to our discussion of the identical instruction as given at the first trial, pages 26-27 above.

XII.

Demurrer to Evidence.

By the railroad's second and third assignments error is charged on the part of the Court of Appeals in not having reversed the judgment by reason of the failure of the trial court to grant the motion for a peremptory instruction in favor of the company.

To this proposition counsel devote twenty-eight pages of their brief, pages 12 to 40, inclusive, referring freely and extensively to the record of *both* trials.

In this purported résumé of the evidence the railroad company has forced counsel to choose between permitting the court to obtain an erroneous conception of the strength of their proof or to indulge in a like extended presentation of omitted parts of the record, the effect of which, however, would be a mere discussion of the weight of the evidence.

Our view of the assignments under discussion is aptly expressed by the Chief Justice in a recent decision of this court:

> "The first contention is based upon the refusal of a request made by the defendant to take the case from the jury by a peremptory instruction. Granting that, in its ultimate analysis, the request involved an appreciation of the Employers' Liability Act, nevertheless we are of opinion that the absolute want of merit in the proposition, in view of the state of the proof, caused the request, intrinsically considered, to be unsubstantial and frivolous as not to furnish any support for the contention that its refusal raised a question concerning the interpretation of the statute."
>
> Southern Railway *vs.* Gadd, 233 U. S., 572.

In the two trials of this action and in the three decisions rendered in the case by the Court of Appeals it has seemed to us that, in every instance where doubt has arisen in the

minds of the trial or appellate courts those doubts have been resolved in favor of the railroad company and against the dependents of decedent; and it is believed that this has been amply evidenced by what has gone before in this brief.

The question as to whether or not the state of facts presented by the evidence adduced was sufficient to warrant a submission of the case to the jury has heretofore been decided in the affirmative seven different times by the courts below whose spirit of fairness to the railroad company cannot be questioned.

To be more specific, the views of opposing counsel on this point have been presented to the trial court four times, namely, before verdict at each of the two trials and on motions for a new trial after verdict at each of two trials.

On appeal they have argued the matter three times before the Court of Appeals, twice on the first appeal and once on the second appeal.

Yet no judge, after reviewing the state of facts produced by the testimony, has ever brought his mind and judicial conscience to the position of holding that the dependents of decedent should be deprived of having their case go to the jury.

Under these circumstances counsel feel justified under this head in not entering into a detailed discussion of the evidence in the case, feeling sure that the court itself will review the record carefully before undertaking to overrule the seven decisions contrary to the contention of the railroad company that the evidence was not sufficient to justify the submission of the case to the jury.

In any review which the court may make of the record, among other things, it will be found that there are certain facts which are either undisputed or as to which evidence was undoubtedly introduced at the *second* trial amply sufficient to leave the matter of their determination to the jury, namely:

(*a*) The decedent was employed by the railroad company

as an engineer and was actually engaged as such in interstate traffic and commerce on September 5, 1908, when he sustained the injury.

(*b*) The injury was caused by the application from the outside at the rear of the train by the rear brakeman of an emergency air brake, producing a sudden, violent and unusual jar or jerk in the engine of sufficient force to throw the fireman off of his seat on the left side of the engine and to strike the shoulder and head of decedent against the engine hard enough to cause his death.

(*c*) The application of the emergency brake and the injury and death resulting therefrom were due to the negligence of the railroad company, its agents or employees other than decedent.

(*d*) Decedent was survived by dependents in the persons of his widow and three minor children, all of whom are represented in the action by his administratrix as plaintiff.

In reviewing the record it will be observed that the employees of the railroad company as witnesses, especially those under the odium of culpability, seemed bent upon conveying the idea to the jury that the emergency brake was frequently applied; but when pinned down they were compelled to admit that the application of the emergency brake was most infrequent as to any one train of cars, although in the aggregate of all the cars equipped with air brakes on the entire L. & N. Railway system or the railway systems of all the world, such brakes must be applied somewhere in the world every day.

The actual fact is, however, as testified by conductor Jones (as well as other witnesses) (R., 146), that the application of "the emergency is *not* a usual procedure; *it is an unusual procedure.*"

The effort was also made to minify, as far as possible, the effects of the application of the emergency brake; but the testimony as to the actual results of its application in this particular instance, when the train was moving slowly, the

testimony of employees of the railroad (other than Hill) as to the likelihood of damage to the train itself, to the effect that it could not be justified for the mere purpose of "bunching the slack" or preventing the obstruction of a crossing, is borne out and emphasized by the language of the rule of the company (R., 145), as shown by the following extract therefrom:

> "The emergency or quick action *must never be used unless* it is to avoid injury to *life or property. No excuse will be taken for its use except as stated.*" (Italics supplied.)

That the application of the air brake without warning, especially in violation of the rules, constitutes negligence within the meaning of the Employers' Liability Act is not only recognized by the Court of Appeals of Kentucky in both of its decisions in this case, but such ruling is in harmony with numerous other decisions, both State and Federal, in instances where injuries are sustained by employees of railroads as a result of unusual or unexpected and unnecessary jars or jerks which might appropriately have been avoided by the company or its other agents. C. & O. Ry. Co. *vs.* Savage, 150 Ky., 260, 263-4; Roberts' Injuries to Interstate Employees on Railroads, pp. 55-6, and cases cited.

And in such cases the jury is free to infer negligence even in the face of the testimony of other members of the train crew to the effect "that the train was handled in the usual and ordinary way without any unnecessary force or jar."

> Ft. Worth D. C. Ry. Co. *vs.* Stalcup (Texas Civil App.), 167 S. W., 279, and cases cited.

There was ample evidence to go to the jury on the subject of negligence of the company; and the refusal of the trial court to give the jury a peremptory instruction in favor of the railroad and the failure of the Court of Appeals to reverse the judgment by reason of its failure so to do, cannot supply any genuine basis for review by this court on writ of error under Sec. 237 of the Judicial Code.

G. N. Ry v. Knapp 240 U.S. (Mch 20/16)

XIII.

Preceding Negligence.

By the railroad's fifth assignment error is alleged on the part of the Court of Appeals in not reversing the judgment on the second trial by reason of the qualifying language used by the trial court in the concluding clause of its fifth instruction to the jury on the subject of negligence.

No objection is taken in this court to instructions numbered 1 and 3 or to the body of said instruction numbered 5 on the same subject.

These three instructions (R., 120-2) read in full as follows:

> "# 1. If the jury believe from the evidence that on the occasion in controversy, the defendant's agents and employees in charge of its train, or any of them did with negligence operate and manage the train upon which plaintiff's intestate was serving as engineer, so as to cause him to fall against the cab or engine, and injure him, and that he died as the natural and proximate result of said negligence, if any, they will find for the plaintiff."
>
> * * * * * * *
>
> "# 3. The court instructs the jury that under the rules of defendant company, it was the duty of the flagman, O. L. Hill, to apply the emergency air brake by the use of the angle cock on the rear of the train, *only when necessary to avoid injury to life or property;* and, if they believe from the evidence that at the time said Hill applied said emergency air brake, it was not necessary, nor believed by the flagman to be necessary in the exercise of a reasonable judgment in the prudent and careful operation of the train, to apply said emergency air brake, to avoid injury to life or property; and shall further believe from the evidence that plaintiff's intestate received the injury which resulted in his death, as the direct and proximate result of the application of said emer-

gency air brake, then they should find for the plaintiff."

* * * * * * *

"# 5. The court instructs the jury that when the plaintiff's intestate entered the service of defendant company as engineer, he assumed all the ordinary risks and hazards incident to that employment; and if the jury further believe from the evidence that flagman O. L. Hill stopped said train by the use of the air valve in the rear of the caboose, when it was necessary so to do, or when said flagman believed in the exercise of a reasonable judgment, in the prudent and careful operation of said train it was necessary so to do, in order to avoid injury to property; and further believed that said stoppage of said train naturally and proximately resulted in the injury, if any, to said Stewart, complained of in the petition, then the law is for the defendant and the jury shall so find; *unless, however, they shall further believe from the evidence that the necessity, if any, for the application of said emergency air brake, had been brought about by defendant's agents or servants, in the negligent operation of said train prior to the application of said brake, in which event they will find for plaintiff.*"

The part in italics in the last-mentioned instruction forms the sole foundation for the allegation of error.

In view of the admission of the rear brakeman Hill (R., 175) that he was moved "principally" by his action in applying the brake 120 feet away from the switch by the purpose "to bunch the slack on this occasion" and other positive evidences of negligence on the part of Hill, the aforementioned instructions of the trial court on the second trial were highly favorable to the railroad company and, if anything, prejudicial in their logical effect to the dependents of decedent, the administratrix on the second trial being embarrassed by the errors contained in the opinions of the Court of Appeals on the first appeal, as more particularly discussed in Part I of this brief in connection with her cross-writ of error.

Notwithstanding such embarrassments and the fact that the administratrix had to rely almost wholly upon the testimony of employees of the railroad company, the indisputable physical facts and the printed rules of the company are such that not only have unanimous verdicts been secured at each trial, but the Court of Appeals, after reviewing the evidence on appeal, has in each instance affirmatively found that there was negligence on the part of the railroad company.

The fact that the injury was caused through the negligence of the railroad company or any agent thereof other than decedent is sufficient; and there cannot have been committed any reversible error on the part of the Court of Appeals in not reversing the judgment of the trial court for any alleged error in the instructions on the subject of negligence.

Furthermore, the instruction proposed by the railroad company on that subject (R., 121) was clearly wrong; and the company's counsel, as in the case of the Illinois Central R. R. Company *vs.* Skaggs, 240 U. S., 66, sat silent when it became their duty under that decision to point out to the court at the trial wherein the instruction might, in their opinion, be corrected.

But, in view of the rules of the company, the physical facts and the indisputable evidence before the jury, it would have been error of a highly prejudicial character for the court to have attempted to give an instruction along the line of instruction 5 (R., 120-1) without some such qualifying clause as that in which, by the fifth assignment, the railroad company charges error.

Among the rules governing employees at the time of the injury were the following:

> "117. Conductors will be held responsible for the proper adjustment of the switches used by them and their trainmen; except where switch-tenders are stationed.
>
> "Whoever opens a switch shall remain at it until

it is closed, unless relieved by some other competent employee.

"Where there is more than one train to use a switch, it must not be left open unless one of the trainmen of the following train is at the switch and takes charge of it.

"117 (*a*). A train about to enter or leave a siding *must come to a full stop before the switch is thrown, and no signal must be given to start the train until the switch is turned and the lock is secured through the hasp.*

"No attempt should be made to close a switch until the last wheels are off the switch rails. The person who locks a switch must grasp the chain and pull the lock to see that it is securely fastened, and, after having done so, must look twice at the switch rails to see that they are in their proper position. *At meeting or passing points the employee attending the switch* will, after locking it to main track, take a *position* not nearer than ten feet from the switch *until the expected train has passed.*"

There was also a special rule governing the use of air brake, reading as follows:

"The emergency or quick action must never be used unless it is to *avoid injury to life or property. No excuse will be taken for its use except as stated.* The necessity for its use can be readily avoided by returning the handle to lap immediately after the release of the first application, and then applying the brakes lightly before the engine reaches the exact spot desired."

Here the rear brakeman had admitted decedent's northbound freight train onto the siding at the south switch at Cumberland, Tennessee, "a meeting or passing point," and he became and was "the employee attending the switch." After locking the switch, instead of taking *"a position* not nearer than ten feet from the switch until the expected train has passed," he goes up the straight main track several hundred feet without let or hindrance on the part of the con-

ductor, "responsible for the proper adjustment of the switches used by them and their trains," although the conductor, standing in the center of the main track, had full view of both ends of his train and, therefore, could necessarily have seen the rear brakeman after he proceeded north beyond the rear end of the train.

So standing, and presumably with actual knowledge of the fact that the rear brakeman was not at his post, and without first taking the necessary precautions incident to requiring the rear brakeman to regain his post at the south switch, the conductor gave orders to the engineer to move backward. The engineer, before doing so, complied with the rules by giving three distinct whistles; and the fireman likewise complied with the rules by taking hold of the rope and continuously ringing the bell. If the conductor intended to back onto the main line at the south switch, he was negligent in giving this order with knowledge of the fact that the rear brakeman had left his position at the switch. If the conductor did not intend to move the train onto the main track at the south switch and the facts and circumstances were such as that it was not negligence on his part to give the signal to back, then the rear brakeman had a right to infer and to expect that, between the point at which he applied the brake and the switch (some 120 to 130 feet), the conductor would cause the train to "come to a full stop before the switch is thrown."

Assuming, therefore, for the sake of argument but not otherwise, that there existed an emergency within the rule, the alleged emergency was clearly created by the preceding negligence of the company's own agents.

The attention of the court is also called to the following authorities bearing upon this branch of the case:

L. & N. Ry. *vs.* Street's Administratrix (Ky. Ap.), 129 S. W., 570.

Perkins *vs.* N. Pac. Ry. Co., 199 Fed., 712.

Transit Development Co. *vs.* C. Elec. S. D. Co., 194 Fed., 963.

Galveston, H. & S. A. Ry. Co. *vs.* Bosher (Texas Civ. Ap.), 165 S. W., 92.

K. C. So. Ry. Co. *vs.* Leslie (Ky. Apps.), 163 S. W., 83.

Penna. Ry. Co. *vs.* Goughnour, 208 Fed., 964.

L. & N. R. R. Co. *vs.* Gillian's Admx. (Ky. App.), 71 S. W., 863.

L. & N. R. R. Co. *vs.* Gordan (Ky. Ap.), 72 S. W., 311.

It was highly appropriate, therefore, that the jury should be given an opportunity to determine the question of fact as to whether or not there had been such negligent operation of the train prior to the application of the emergency brake as to bring about what occurred.

But there was no emergency. The alleged danger to PROPERTY "splitting the switch" was not immediate. Even so, Hogan testified that the same could have been repaired in four or five minutes, and said, "I would let any train on earth back up through any switch before I would open an angle cock on an engineer" (R., 200-1). See also Evidence of Minor (R., 46-47); Jones (R., 87); Suttle (R., 85); Neill (R., 82); Sharpe (R., 95).

Thus it is clear that the qualifying clause of the instruction was made necessary and appropriate by the peculiar facts in the case; and that under no view of the matter, in the face of affirmative evidence of negligence on the part of the railroad company in the premises, could the action of the Court of Appeals of Kentucky in not reversing the judgment on this ground be found reversible error.

XIV.

No Error on Second Trial Prejudicial to Company.

We have shown in Part I of this brief that the errors committed by the Court of Appeals in reversing the judgment obtained at the *first* trial, as more particularly set forth in the assignments of error in support of the cross-writ of error, were highly prejudicial to the administratrix and that the original judgment for $20,000 should be reinstated, in which event the judgment obtained at the second trial would be eliminated as a matter of course.

We have shown in Part II of this brief that no errors were committed by the Court of Appeals prejudicial to the railroad company in its action affirming the judgment obtained at the *second* trial.

On the contrary, errors were committed by the trial court at the second trial which were highly prejudicial to the interests of the administratrix. So much so that the only way this court, under the peculiar circumstances of the case, can accord to the dependents of decedent that relief to which they are entitled is to reinstate the judgment entered at the first trial because in the unequal test of endurance between them and the railroad company in its plan of endless litigation, she has been forced to refrain from seeking a *third* trial, even in the face of the most flagrant disregard of her rights in the second trial, namely:

1. By allowing the railroad company to amend its answer (R., 111) so as to aver the payment on the life of decedent of insurance amounting to $5,000; and

2. By permitting the railroad company at the second trial (R., 134 *et seq.*) to introduce testimony showing the collection by the widow of something over $5,000 insurance on the life of decedent, no part of which was contributed to or paid by the railroad company.

In addition to this, acting under the instructions of the Court of Appeals in its judgment of reversal of the first judgment, the trial court at the second trial also gave instructions on the measure of damages the effect of which was to exclude damages for the loss of services of decedent to the extent of "that care, counsel, training, and education which" the children "might, under the evidence, have reasonably received from the parent, and which can only be supplied by the services of another for compensation," as is referred to above in connection with the discussion of the cross-writ of error (pp. 27-30).

Furthermore, the dependents of decedent suffered at the second trial as a result of the erroneous instructions of the Court of Appeals requiring an apportionment of the verdict, to the extent of having to try out before the jury in this action matters with which the railroad company had no concern—all contrary to the requirements of the statute as construed by this court and more particularly discussed above in connection with the cross-writ of error (pp. 20-24).

It is not surprising, therefore, that the amount of the verdict on the second trial was very much reduced as compared with that of the first trial.

Thus it is clear that, instead of the errors committed by the trial court at the second trial being prejudicial to the railroad company, such errors as were made by or reflected through the trial court at the second trial were highly prejudicial to the dependents of decedent.

Conclusion.

In conclusion it is respectfully urged that the court should sustain the cross-writ of error as sued out by the administratrix and give proper direction for the reinstatement of the judgment for $20,000 and costs rendered at the first trial.

Should the court, however, fail to sustain said writ of error and reinstate said judgment, it is respectfully urged that the

writ of error as sued out by the railroad company should not be sustained, but that the facts and circumstances in connection therewith render it highly appropriate that this court should impose damages upon the railroad company under Rule 23.

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ADDENDUM.

Reply Brief of Railroad.

Lest the court may be misled by the apparent misconception by opposing counsel of our position, brief reference to their brief seems appropriate.

"Crucial Error—Apportionment of Verdict."

Our contention was that the first judgment was not defective or reversible because based upon a verdict *in solido;* and that the action of the Court of Appeals in so construing the Federal statute was reversible error. See pages 20-24, 27, 28, above.

Our idea is that this was the crucial error and accounts for the reversal on first appeal, and which is borne out by the following:

The court specifically found in its first opinion (R., 104-109):

(*a*) That, according to the Kentucky practice, the specific acts of negligence did not have to be plead; and that, therefore, the demurrer of the railroad company was rightly overruled.

(*b*) That *"the motion for a peremptory instruction was properly overruled,"* negligence on the part of the company being pointed out by the court.

(*c*) That, by instruction No. 3 (R., 26) the damages were clearly *confined to pecuniary damages;* and by the decision on rehearing (R., 109) the court admitted that, in making the criticisms contained in its original opinion, it had overlooked "that this case was tried under the Federal Employers' Liability Act, and * * * the Kentucky rule as to the measure of damages was incorrectly directed to be given on another trial."

(*d*) That the Court of Appeals did not consider the giving on the first trial of instruction No. 4 (R., 26) on contributory negligence as reversible error is demonstrated by the fact that at the second trial, on the same state of facts in that regard, *the identical language* was used by the trial court in its instruction No. 4 (R., 120); yet the *judgment was affirmed* on the second appeal.

It is immaterial, however, whether or not the measure of damages was included with the apportionment of the verdict as a cause of the judgment of reversal, as our assignments of error on cross-writ of error are ample for a review here.

Measure of Damages.

On the measure of damages the third assignment (R., 26) at the first trial confining the verdict as it did to pecuniary damages, certainly contained no error prejudicial to the railroad company, as further discussed above, pages 27-30.

The railroad company's reply brief, pages 7-8, asserts that we admit that the instructions given by the trial court were not correct under the Federal act. What we do say is that instruction No. 3 sounds in pecuniary damages and is in sub-

stantial compliance with the Federal statute, except that it unduly limited recovery; and, therefore, to the extent there was error at all, the same tended to the prejudice of the administratrix and not to the prejudice of the railroad company.

For this and other reasons indicated the railroad company was in no position to complain of the instructions covering this point.

Reinstatement of First Judgment.

In direct opposition to the facts just stated in (*a*) and (*b*), the railroad company insists (pages 3-4) that the Court of Appeals held—

> "that the jury should have been peremptorily instructed to find for defendant for lack of evidence that it was negligent."

In the face of general instruction No. 1 (R., 25) on the subject of negligence, it is also suggested that there was no instruction including the negligence of the conductor, Jones, and the remarkable proposition is advanced that a retrial was essential for the purpose of having the jury pass on the negligence of Jones, whereas the court itself found that the evidence adduced was sufficient to show his negligence.

The fact that the testimony of Jones was not introduced at the first trial and that no special instruction was proposed by the railroad company on the subject of his negligence are among the things for which the company itself is responsible. It is also interesting to note that it did not place Jones on the stand at the second trial and that no special instruction was offered by the company (R., 121) at the second trial on the subject of the negligence of Jones.

The failure of the railroad company to assign its alleged error on the part of the Court of Appeals in finding affirmatively that *"the motion for peremptory instruction was*

properly overruled (R., 108) by the trial court at the first trial, aside from the difficulty due to its not being a Federal question, closes its mouth from the assertion now that a retrial is necessary upon a reversal of the errors assigned by the administratrix in her cross-writ of error.

The proper form of the judgment on the cross-writ of error will be to reverse and remand "with instructions to reinstate the judgment entered" in the trial court on April 11, 1912, and which should be "affirmed."

Jones National Bank *vs.* Yates *et al.*, 240 U. S. (decided April 3, 1916).

Campbell *vs.* N. W. Eckington Imp. Co., 229 U. S., 561, 585, and other cases cited, pages 15-17 above.

Railroad's Writ of Error.

Res Ipsa Loquitur.

In the case of Great Northern Ry. Co. *vs.* Wiles, 240 U. S., —, decided March 20, 1916, this court says:

> "The application of the doctrine to cases like that at bar (an Employers' Liability Act case) is disputable. * * * We, however, do not have to go further than *to indicate the dispute.*"

The railroad company, in its original brief, page 16, says: "The doctrine *res ipsa loquitur* is not applicable."

Averment and Proof of Insurance.

The contention, page 16 of company's reply brief, is untenable.

The apportionment in the same action was both unnecessary and injurious to defendants, pages 20 to 24 above.

And the introduction of the element of insurance was highly prejudicial to defendants (pages 51-52 above).

Seven Decisions Below Should Not Be Disturbed.

In the case of Great Northern Railway Co. *vs.* Knapp, 240 U. S. (decided March 20, 1916), is aptly described the situation of the company in this case on the subject of peremptory instructions:

> "The case, then, is one in which there is no question as to the interpretation of any provision of the Federal act or as to the definition of legal principle in its application, but simply involves an application of all the facts and admissible inferences in the particular case for the purpose of determining *whether there were matters for the consideration of the jury. The State courts, trial and appellate, held that there were.* Having regard to the appropriate exercise of the jurisdiction of this court, we should not disturb the decision upon a question of this sort unless error is *palpable*" (italics supplied).